No. 98-5881-CSY Title: Benjamin Lee Lilly, Petitioner
v.
CAPITAL CASE Virginia

Docketed: Court: Supreme Court of Virginia
September 2, 1998

Entry	Date	Proceedings and Orders
	Sep 2 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 2, 1998)
	Oct 5 1998	Brief of respondent Virginia in opposition filed.
	Oct 5 1998	Appendix of respondent Virginia filed.
	Oct 15 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	Petition GRANTED. SET FOR ARGUMENT March 29, 1999. **********
	Dec 7 1998	Joint appendix filed.
	Dec 18 1998	Motion of National Association of Criminal Defense Attorneys, et al. for leave to file a brief as amicus curiae filed.
	Dec 22 1998	Brief of petitioner Benjamin L. Lilly filed.
	Dec 22 1998	Motion of American Civil Liberties Union, et al. for leave to file a brief as amicus curiae filed.
	Jan 5 1999	Order extending time to file brief of respondent on the merits until February 1, 1999.
	Jan 11 1999	Motior of National Association of Criminal Defense Attorneys, et al. for leave to file a brief as amicus curiae GRANTED.
	Jan 29 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Feb 1 1999	Brief of respondent Virginia filed.
	Feb 1 1999	Brief amici curiae of Nebraska, et al. filed.
	Feb 11 1999	CIRCULATED.
	Feb 12 1999	Record filed.
	Mar 3 1999	Reply brief of petitioner Benjamin L. Lilly filed.
	Mar 29 1999	ARGUED.

98-5881 (2)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FILED
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SUPREME COURT, U.S.

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner respectfully requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's declaration in support of this motion is attached hereto.

Benjamin Lee Lilly

Benjamin Lee Lilly

191047

43 pp

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

DECLARATION IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

I, Benjamin Lee Lilly, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress. I further declare, under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am presently incarcerated in the Sussex 1 State Prison, 24414 Musslewhite, Waverly, Virginia 23819-1111. I have no sources of income.

2. I have not received, during the past twelve months, any income from any business, profession, or other form of self employment, or in the form of rent payments, interest, dividends, or other sources.

3. I do not own any cash or have a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. I have one dependent, Loretta Lilly, who is my wife.

6. For the reasons stated, I respectfully request that I be permitted to file the attached petition for a writ of *certiorari* without prepayment of costs and to proceed *in forma pauperis*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated. Sussex 1 State Prison
Waverly, Virginia
~~August~~ September 1, 1998

Benjamin Lee Lilly
Benjamin Lee Lilly

191048

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

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98-5881

Lilly
v.
Virginia

QUESTIONS PRESENTED

(CAPITAL CASE)

I. Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against interest of an unavailable witness because the declarant refused to testify under the Fifth Amendment, violates the Confrontation Clause of the Sixth Amendment?

II. Whether there is a firmly rooted exception to the hearsay rule which would permit the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, without violating the Confrontation Clause of the Sixth Amendment?

III. In assessing the reliability of the hearsay statements of an unavailable declarant, offered as a declaration against interest, whether the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence other than the circumstances surrounding the making of the statement?

PARTIES

All of the parties to the proceedings below are listed in the caption of the case, *supra*. *See* Sup. Ct. R. 14.1(b).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Benjamin Lee Lilly (hereafter "Petitioner" or "Ben Lilly") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia affirming his conviction and sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is officially reported at 255 Va. 558, 499 S.E.2d 522 (1998), and appears in Appendix A of this petition. The rulings of the Circuit Court of Montgomery County (the trial court) were not reported and appear in Appendix B.

JURISDICTION

This petition seeks review of the final judgment of the Virginia Supreme Court in this matter, entered April 17, 1998, as to which a motion for rehearing was denied on June 5, 1998.

The order on rehearing appears in Appendix C of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution (the "Constitution") are reprinted in full at Appendix D, pursuant to Supreme Court Rule 14.1(f).

SUMMARY OF THE ARGUMENT

1. This Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of an accomplice's custodial confession at the criminal trial of a defendant because such statements are inherently unreliable. *See, e.g., Lee v. Illinois*, 476 U.S. 530 (1986). Following this fundamental principle, the United States Circuit Courts of Appeals – confronting post-arrest hearsay statements by an accomplice, made while in custody and in response to police interrogation, which incriminate another and which peripherally incriminate the declarant, but which minimize the declarant's role in the criminal activity and shift blame to others in an attempt to curry favor – have uniformly concluded that such statements are inadmissible under the Confrontation Clause. Notwithstanding these well-established principles, the Virginia Supreme Court upheld admission of an unavailable accomplice's statements to police, finding that they fell within a firmly rooted exception to the hearsay rule.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard. That decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments, as well as precedent from every United States Circuit Court of Appeals confronting similar circumstances. Sup. Ct. R. 10(b). Certiorari is also warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

2. This Court has made clear, in a case involving a confession by an accomplice that incriminated a criminal defendant, that the general category of statements against interest is too large a class for meaningful Confrontation Clause analysis, *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986), and that such statements do not fall within any recognized hearsay exception, *Williamson v. United States*, 512 U.S. 594, 601, 604-05 (1994). The Virginia Supreme Court nevertheless concluded that the custodial confession of an accomplice incriminating a criminal defendant was admissible because it falls within a firmly rooted hearsay exception.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard as well. The Virginia Supreme Court's decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided as to whether the hearsay exception for statements against penal interest, as specifically applied to custodial confessions from an accomplice who is unavailable to testify at trial, is a firmly rooted exception to the hearsay rule. Finally, as above, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

3. This Court has made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be considered. *Idaho v. Wright*, 497 U.S. 805 (1990). The Virginia Supreme Court ignored that controlling guidance and expressly and impermissibly based its decision concerning the reliability of the hearsay statements based on other supposed evidence at trial corroborating the hearsay statements.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard as well.

The Virginia Supreme Court's decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided in the manner and extent to which they follow the established precedents of this Court, and those decisions conflict with controlling decisions of this Court which prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable accomplice. Finally, as with the prior issues, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

STATEMENT OF THE CASE

On December 5, 1995, Alexander V. DeFilippis ("DeFilippis") was carjacked and subsequently murdered. This took place after three individuals – Gary Wayne Barker ("Barker"), Petitioner and Mark Lilly – had been on a binge, drinking and smoking marijuana, beginning the prior day. On December 4, 1995, after beginning their drinking and smoking, the three men broke into a friend's house, stole several guns, a safe (which they broke open) and a quantity of liquor. JA 2033-34.[1] The three then continued to drink and smoke marijuana.

The next day, December 5, 1995, the three men fired the stolen guns at some geese, killing one which they put into the trunk of the car they were driving. JA 2043. Later that day, the car they were using broke down in the vicinity of a convenience store near Heathwood, Virginia. JA 2050. DeFilippis was standing outside another car at the convenience store. JA 2053. He was ordered in the car, the car was hijacked and DeFilippis was subsequently murdered. JA 2054-

[1] Citations to "JA __" are to the joint appendix in the appeal to the Supreme Court of Virginia. All cited portions thereto are reproduced at Appendix F, pursuant to Supreme Court Rules 14.1(g)(i), (i)(v).

2064. The three men then left the body and bought some beer. JA 2065-66. They later robbed a convenience store, JA 2069-2071, and attempted to rob a second convenience store in Giles County. JA 2076-2078. A short time later, the car broke down and police arrived shortly thereafter. JA 2078-2080. All three men were arrested. JA 2082, 2086.

Petitioner was charged with the abduction and robbery of DeFilippis; carjacking; murder as part of the commission of the robbery of DeFilippis; and the use of a firearm in the foregoing offenses and the unlawful possession of a firearm. JA 3-11. At Petitioner's five-day trial, which began on October 21, 1996, the state's principal evidence consisted of the testimony of Barker, who had received a plea bargain on the same charges facing Petitioner, and the admission of a confession by Mark Lilly, who had also received a plea bargain on the same charges. Barker's testimony was contradicted in numerous respects by others and was also inconsistent in numerous respects with Mark Lilly's confession. Mark Lilly's confession was, in the main, exculpatory of Mark Lilly. Although he minimally and peripherally inculpated himself in lesser crimes, the principal thrust of the confession was to place the blame for the capital crime on Petitioner, and to shift blame for most aspects of the crimes to Petitioner or Barker. The trial court admitted the confession of Mark Lilly without basis in law. Absent that confession in the record, there was scant credible evidence of capital murder against Petitioner.

The Barker Testimony

Barker testified that he, Petitioner, and Mark Lilly, spent the day before and the day of the murder drinking a considerable amount of liquor and that he and Mark Lilly had also been smoking marijuana. Barker described the robbery of a residence the night before, and stated that when their car broke down the next day, Petitioner confronted DeFilippis, who was nearby standing next to his vehicle, ordered him into the car at gunpoint, robbed him of his wallet, called Barker and Mark Lilly over to the car, drove to a secluded area and shot DeFilippis. Barker then described the robberies of two convenience stores following the murder, and testified that he was arrested as he sat in a ditch with a rifle in his mouth and called out for the police to tell his mother

that he loved her, wanting to kill himself "[f]rom what I seen and, and, and, and for what I did." JA 2082-84, 2147.

Barker's testimony was impeached by other witnesses on numerous points:

First, Barker testified that Ben Lilly shot DeFilippis at point blank range. JA 2148. On the contrary, Dr. David Oxley, a forensic pathologist and deputy chief medical examiner for West Virginia, testified that the victim's wounds revealed no gunshot residue, which would indicate shots fired from a greater distance. JA 1973, 1975.

Second, Barker denied having seen Joyce and Michael Lang the day before the murder and denied telling them that he could kill his best friend and not regret it. JA 2124. On the contrary, Joyce Lang testified that Barker had said "[t]hat he could kill his best friend without regretting it," and that she had therefore not wanted her son to go out with Mark Lilly and Barker. JA 2504.

Third, Barker denied that later on December 4, 1995, he pointed a gun at or threatened A.J. Falls, an acquaintance whom they visited, and denied that Mark Lilly had pulled the hammer back on a pistol and pulled it out to threaten anyone. JA 2121-22. Falls testified, however, that Barker pointed a rifle at him, JA 2438-39, and that later, when words were exchanged with a neighbor, Mark Lilly pulled the hammer back on the pistol he was carrying inside his sweater jacket, exposed the gun and gave the impression that he was going to pull it out, JA 2445-48.

Fourth, when asked whether at a bar that same night, he pulled out a gun and Ben Lilly admonished him to put the guns away, Barker testified, "Definitely not." JA 2125. Once again, to the contrary, Ron Lucas testified that he was shown a rifle by Barker, and stated that when Barker did so, Petitioner told Barker to "put the, the God damn guns away." JA 1615.

Fifth, Barker denied having pointed a gun at Howard Barnett, one of the owners of the first store that was robbed. JA 2139. Both Mr. and Mrs. Barnett, who was also in the store when the robbery occurred, testified that Barker pointed a gun at him. JA 2474, 2545.

Finally, Barker denied saying to Bill Williams, who attempted to prevent the second convenience-store robbery, that he would blow his head off, while pointing a gun at his forehead. JA 2126. Mr. Williams testified, however, that Barker, after struggling with him and while

holding a gun to his head, said, "I'll blow your head off," and Mr. Williams then directed the clerk to hand over "the damn money." JA 2576. Mona Hylton, the clerk working in the store at the time of the robbery, also testified that Barker pointed the gun at Williams' head, adding that Barker had pulled the hammer back on the gun. JA 2597-98.

Thus, absent additional direct evidence implicating Ben Lilly in capital murder, Barker's testimony was a weak foundation for conviction.

The Mark Lilly Confession

Support for that weak foundation to convict Ben Lilly of capital murder was unconstitutionally provided by the confession of Mark Lilly. At trial, the state called Mark Lilly as a witness, but he invoked his Fifth Amendment privilege. JA 2243-44. Contending that Mark Lilly was therefore unavailable as a witness, the state sought to introduce two statements he had made to police while in custody as declarations against interest. JA 2218-22. Petitioner objected, arguing that admission of the statements would violate the Confrontation Clause because they were self-serving, minimizing Mark Lilly's culpability by shifting responsibility for the alleged crimes to Barker and Petitioner, and therefore unreliable. JA 2212-2217. The trial court overruled Petitioner's objection and admitted the statements in their entirety, finding that the statements were against Mark Lilly's penal interest and therefore reliable, and that their admission would not violate the Confrontation Clause because they were admitted under a firmly rooted hearsay exception. JA 2226-27. The trial court based its determination of the reliability of the statements on "the evidence and exhibits before it and the facts and circumstances of this particular case[,]" and its examination of "whether there is any other substantial link to connect [Petitioner] with the crime other than the statements that are at issue here." JA 2227.[2]

---

[2] The foregoing also is submitted in compliance with Supreme Court Rule 14.1(g)(i) concerning preservation in the trial court of the federal questions sought to be reviewed. The trial court overruled the objection. JA 2226-27. Petitioner raised the claim before the Supreme Court of Virginia on appeal. Opening Brief of Appellant to the Supreme Court of Virginia at 28-32 (arguing that the trial court's

Footnote continued

In his statements to police,[3] Mark Lilly repeatedly offered claims of mitigating circumstances and also consistently shifted primary responsibility to others. Mark Lilly began by explaining that he, Ben Lilly and Barker had started drinking the day before, JA 2256, 2319, and had "partied all night," JA 2318, that he had awoken drunk that morning and that he had been drinking liquor -- "Vodka, Evan Williams, Jim Beam, a little bit of everything" -- all that day, JA 2258. Throughout his statement, Mark Lilly relied on his drunkenness as an excuse for his lack of memory as well as for his actions.[4]

Footnote continued from previous page

admission of evidence of a co-defendant's statement as statements against penal interest violated the confrontation clause, and the Fifth, Sixth, And Fourteenth amendments to the Constitution). The Virginia Supreme Court rejected the argument. *Lilly v. Commonwealth of Virginia*, 499 S.E.2d 522, 534 (Va. 1998). Petitioner again raised the claim on a petition for rehearing. Appellant's Petition for Rehearing in the Supreme Court of Virginia at 1 (contending that the court erred in upholding the admission of Mark Lilly's out of court statement). The Virginia Supreme Court denied the petition. (All cited portions concerning preservation are reproduced separately at Appendix E, pursuant to Supreme Court Rule 14.1 (g)(i).)

3 The officers explained to Mark Lilly that by speaking with them he could "at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred." JA 2257. When Mark Lilly became concerned that he would be incarcerated for "armed robbery" and "some kind of murder charge," the officers explained, "That's why we're talking to you, we're trying to help you right now . . . ." JA 2324. *See* JA 2326 ("We're trying to help you . . . .").

4 JA 2257-58 ("What time did ya'll leave that residence this morning? I have no idea. . . . Besides, I've been drunk all day, I was drunk when I got up."); JA 2258-59 ("So you went to a residence, you got the liquor out, and what else did you get? I don't, I don't really know, you know, everything that was got out cause I was drunk."); JA 2263 ("So did all of ya'll load into the car then? I had to or get left man, I was so drunk."); JA 2264 ("Anything that you remember about him? What he was wearing or anything that stood out? I don't really remember man, I was so drunk."); JA 2273 ("You didn't pay for it, you just took it? Right, I was so drunk, I don't do that shit, you know, if I'm sober."); JA 2276 ("Did ya'll discuss it before you went in, say 'Ben you stay here and we're gonna go in and rob this' or what was the discussion? We was all so drunk."); JA 2318 ("If you would, let's talk about how did yesterday start off? I was drunk. . . . I was drunk. . . . Drunk as I ever been."); JA 2321 ("Anything else you can think of? Not that I can think of. I was so drunk. I was drunk when you brought me in here at 1:30 this morning."); JA 2321-22 ("What do you remember next? . . . Drunk as shit, that's all I remember."); JA 2323 ("Ben told ya[']ll to come on? Yeah, we was drunk."); JA 2324 ("What did they, where were the rifle and shotgun at that time? I don't even know. I wasn't worried about no gun. I was drunk, the only thing I keep up with man is the beer.").

Despite the testimony of Barker and the statement of Mark Lilly regarding the large amounts of alcohol the three men consumed the night before and the day of the murder, the trial court refused to provide an

Footnote continued

Having attempted to establish his drunkenness as an excuse, Mark Lilly then proceeded to minimize his role in every aspect of the alleged crimes, consistently shifting blame onto Barker and Petitioner. First, Mark Lilly addressed the theft from the friend's residence the night before the murder. He said Petitioner stole liquor from the residence, JA 2258, and stated that Petitioner and Barker also stole "some guns or something," JA 2259.

Second, Mark Lilly identified Petitioner as the one who pulled the gun during the carjacking, JA 2262, 2322, placing himself passively in the car while the carjacking was occurring. JA 2322. When asked if he had ridden away in the carjacked car, he explained that he "had to [get in the car] or get left man." JA 2263. He further denied having a gun while riding in the car. JA 2264.

Third, Mark Lilly stated that he had "nothing to do with the shooting," going so far as to even deny having exited the car when DeFilippis was shot. JA 2265, 2267, 2326, 2331. He explained that he thought Petitioner was going to leave the victim outside the car and just take the car. JA 2268.

Fourth, with respect to the robbery of the first convenience store, Mark Lilly said simply that "they wanted to rob it." JA 2272. He added that either Petitioner or Barker was armed, but denied carrying a weapon himself, and identified Petitioner as having stolen the money from the store. JA 2272, 2274. In his most direct inculpatory admission, Mark Lilly confessed that he stole a twelve pack of beer from that store; however, he quickly explained that he did so only because he was drunk. JA 2272-73.

Footnote continued from previous page

instruction on intoxication. The trial court also refused to exclude from evidence blood stains found on Petitioner's pants despite the fact that the state's expert could not determine whether the blood was human blood (or goose blood) and testimony from Barker that the three had shot and killed a goose which they had then placed in the trunk of their car. These rulings by the trial court, although not raised in this petition, further deprived Petitioner of a fair trial.

Finally, with respect to the robbery of the second convenience store, Mark Lilly again denied carrying a weapon, and identified Barker as being armed. JA 2275. He explained that Barker confronted the clerk, brandishing a gun and announcing that this was a robbery. JA 2276. When asked about shots fired from the car as they made their escape, he said he did not know who fired the shot out the window, but denied that he had done so. JA 2277.

Accordingly, if Mark Lilly's statements to police are credited, he was drinking significant amounts of alcohol and was merely present when the various crimes he described occurred. However, he never admitted making a single decision with respect to any of the crimes, other than deciding to get in the victim's car so as not to be left behind; he never admitted carrying or brandishing a weapon during the carjacking or the robberies; he never admitted stealing anything from their friend's house; he only admitted stealing beer from the convenience stores, and then only because he was drunk; and he never admitted even speaking to the victim. That is not the type of statement against penal interest which may constitutionally be used against a capital murder defendant, or any other criminal defendant.

Mark Lilly refused to testify at trial, invoking his Fifth Amendment privilege against self-incrimination. At the sentencing hearing, Mark Lilly recanted his statements to police, testifying that he had lied to the authorities – specifically, that he had robbed the victim and that at the time of the murder he was vomiting near the other side of the car and therefore could not say who committed the murder. JA 3095-97, 3098. He explained that when "[t]he investigator started talking all these life sentences . . . I could get . . . I got scared . . . [and] [t]hr[e]w it off on somebody else." JA 3096. He further explained that he blamed the murder on Ben Lilly, and not Barker, because he feared what Barker might say about him: "Well, me and Gary, we, we've been, we've been in a whole lot of trouble together and Gary knows a whole a lot on me . . . ." JA 3102.

The Contradictions Between Barker and Mark Lilly

Barker's testimony contradicted Mark Lilly's statements to police on several points, particularly with respect to Mark Lilly's own culpability.

First, while Mark Lilly placed himself in the car during the carjacking, Barker stated that he and Mark Lilly were walking towards the woods with the guns and liquor. JA 2051.

Second, Mark Lilly said that he was in the car when the shooting occurred, and that only Petitioner and DeFilippis had gotten out, JA 2237, but Barker stated that all four had gotten out of the car. JA 2057.

Third, while Mark Lilly denied having a weapon in the car, Barker testified that Mark Lilly was carrying a pistol in his pants. JA 2057.

Fourth, Mark Lilly stated that Petitioner shot DeFilippis from about "ten to fifteen yards" away, JA 2268, whereas Barker testified that Lilly shot him at point blank range, JA 2148. Barker testified, moreover, that Mark Lilly ordered DeFilippis to start walking away from the car, and that Petitioner asked Mark Lilly for the pistol which he was carrying, events which Mark Lilly completely omits. JA 2061, 2063-64.

Fifth, Mark Lilly stated initially that nothing was said when Petitioner returned to the car after the shooting, JA 2269, 2329-30, but later asserted that he and Barker said, "Goddamn. Motherfucker shot him," and that Petitioner responded, "I shot the dude and I think he's dead," JA 2331-32. Barker testified, however, that he and Mark Lilly asked Petitioner why he had done it and that Petitioner had responded that he did not want to return to the penitentiary. JA 2065.

Finally, while Mark Lilly said that Petitioner stole the money from the first convenience store, Barker testified that Mark Lilly rifled through the cash register. JA 2073.

Thus, Barker's testimony did not corroborate Mark Lilly's custodial statements to the police. The only evidence the state introduced which it relied upon to corroborate Mark Lilly's statements were (1) allegedly inculpatory statements made by Petitioner to officer Whitsett at the scene of Lilly's arrest; (2) Petitioner's statements to Mark Lilly to give himself up because he was "not the one who has done anything wrong"; and (3) forensic testimony about blood on

Petitioner's pant leg.[5] Brief of the Commonwealth in the Supreme Court of Virginia at 34-35. There were no fingerprints on the murder weapon or any other physical evidence linking Petitioner to the murder. The trial court relied upon that allegedly corroborating evidence in admitting Mark Lilly's statements, and not upon any inherent indicia of trustworthiness, of which there were none.[6]

The jury, focused on the weakness of the direct evidence, requested clarification on the meaning of circumstantial evidence, JA 3418, and ultimately found Petitioner guilty on all charges. On appeal, the Virginia Supreme Court concluded that Petitioner's right of confrontation was not denied by the admission of Mark Lilly's statements to police. The court rejected Petitioner's argument that Mark Lilly's statements to police, which sought to limit Mark Lilly's own culpability by implicating others, were inherently unreliable. According to the Virginia Supreme Court:

> [I]n determining the admissibility of a statement against penal interest made by an unavailable declarant . . . , the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in sufficient indicia of reliability to overcome the hearsay bar . . . . That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

499 S.E.2d at 534. Finding that declarations against penal interest constitute a firmly rooted exception to the hearsay rule in Virginia, the court held that Petitioner's right to confrontation was not violated by admission of Mark Lilly's statements to police. *Id.*

As we shall now demonstrate, that decision was fundamentally flawed. As noted at the outset, this Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of a custodial confession of an accomplice at the separate trial of a defendant because such statements are inherently unreliable. Moreover, contrary to the views of the Virginia Supreme Court, the United States Circuit Courts of Appeals have uniformly concluded that post-arrest statements, made while in custody in response to police interrogation, which incriminate another and peripherally incriminate the declarant, and shift blame to others in an attempt to curry favor, are inadmissible. Furthermore, this Court has made clear that the general category of statements against interest is too large for meaningful Confrontation Clause analysis, and that custodial statements by an accomplice that incriminate a criminal defendant do not fall within a recognized hearsay exception. This Court has also made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be evaluated. As a result, there are special and

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5 The Virginia Supreme Court also relied on evidence showing a "correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." *Lilly*, 499 S.E.2d at 534. The identity of these accounts is unclear. The court may have been referring to statements by witnesses about the robberies that occurred later in the evening. Those accounts, however, do nothing to support Mark Lilly's statements about who committed a murder at a different place and time from the robberies.

6 The evidence relied upon by the state to corroborate Mark Lilly's statements should not have been considered and was not truly corroborative. (1) Police Chief Whitsett's assertions that Ben Lilly asked to be killed the night he was arrested and then responded "me" to the statement by Whitsett, "what does a murderer look like anyway?", JA 2197, are not truly corroborative of Mark Lilly's statements. That exchange between Petitioner and Whitsett shows that Petitioner was upset that he was involved in anything related to the murder, without showing that Petitioner was directly involved in the shooting. Indeed, if such conduct evidences Petitioner's guilt, the same must be said for Barker, who, when he was arrested, was found sitting with a shotgun in his mouth. (2) Likewise, Petitioner's alleged warnings to Mark Lilly to turn himself in, JA 2187, only serve to exculpate Mark Lilly; they do not affirmatively corroborate Mark Lilly's statements that Petitioner committed the murder. (3) Finally, the state's own expert admitted that the evidence concerning the blood on the pant leg was inconclusive and that it could have been non-human (for example, goose) blood. JA 2016.

important reasons for this Court to exercise its discretion and grant the petition for a writ of certiorari to prevent the wrongful and unconstitutional execution of Ben Lilly.

REASONS FOR GRANTING THE WRIT

I. Admission Of Mark Lilly's Post-Arrest Statements Violated Petitioner's Sixth Amendment Right To Confrontation Because A Post-Arrest Statement, Made By A Non-Testifying Accomplice In The Course Of Custodial Interrogation, Which Incriminates The Defendant and Peripherally Incriminates The Declarant, And Which Shifts Blame To The Defendant, Is Inherently Unreliable And Therefore Inadmissible.

Petitioner's conviction rests squarely on the uncross-examined hearsay statements of Mark Lilly, statements made under circumstances which this Court has repeatedly held render the statements presumptively unreliable and inadmissible under the Confrontation Clause. Mark Lilly's statements were made following his arrest, while he was in custody and in response to police questioning. The statements were made after he was told that the court would be informed of his cooperation. Those circumstances provided Mark Lilly a strong incentive to shift or spread blame, curry favor, or divert attention to another, which is precisely what he did. Mark Lilly, throughout the statements, consistently relied on his drunkenness and, more important, minimized his role in the robberies and the murder and shifted blame to Barker and Petitioner. Indeed, if Mark Lilly's statements are credited, he merely happened to be present, not initiating any criminal activity, not holding a gun during the robberies and not exiting the car when the carjacking or the murder occurred, and only stealing beer because he was drunk. As this Court and every Court of Appeals confronting similar facts has concluded, Mark Lilly's statements were made under circumstances that render them inevitably suspect. Admission of these statements into evidence, without the opportunity for cross-examination, violated Petitioner's right to confrontation under the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. amend. VI. As this

Court has observed, "'[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Lee v. Illinois* , 476 U.S. 530, 540 (1986) (citation omitted). The right to confront and cross-examine adverse witnesses fulfills this requirement first by "contribut[ing] to the establishment of a system of criminal justice in which the perception . . . of fairness prevails," and "ensuring that convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals." *Lee*, 476 U.S. at 540. Critically, the right to confront and to cross-examine witnesses "promotes reliability in criminal trials." *Id.* As this Court has counseled, confrontation and cross-examination advance the pursuit of truth by

> "(1) ensur[ing] that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forc[ing] the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility."

Id. (quoting *California v. Green*, 399 U.S. 149, 158 (1970)) (footnote omitted).

In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court established "a general approach" for determining when statements incriminating a defendant and falling within an exception to the hearsay rule are admissible under the Confrontation Clause and this Court reiterated that general approach in *Idaho v. Wright*:

> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded,

at least absent a showing of particularized guarantees of trustworthiness."

497 U.S. 805, 814-15 (1990) (quoting *Roberts*, 448 U.S. at 65) (emphasis added).

This Court has inferred reliability where the evidence falls within a firmly rooted hearsay exception because those "hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Roberts*, 448 U.S. at 66; *see White v. Illinois*, 502 U.S. 346, 355 & n.8 (1992) (stating that the Court has concluded that "firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the Confrontation Clause because such statements "are made in contexts that provide substantial guarantees of their trustworthiness"); *see also Wright*, 497 U.S. at 817 ("[A]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.").

Additionally, this Court has made clear that in assessing the particularized guarantees of trustworthiness of a hearsay statement, "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 819. Because statements falling under a firmly rooted hearsay exception are so inherently trustworthy that cross-examination is unnecessary to establish their reliability, and "[b]ecause evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, [the Court has concluded that] evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citation omitted).

Tested by those standards, Mark Lilly's statements fell far short and should not have been admitted. Their admission violated Petitioner's constitutional rights.

A. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Inherently Unreliable And Its Admission At Trial Violates The Confrontation Clause.

Under well-established caselaw, uncrossexamined hearsay statements like Mark Lilly's, which are part of a custodial confession by an accomplice that incriminates a defendant, are not admissible under Confrontation Clause analysis. This Court has consistently underscored the inherent and inevitable **unreliability** of such hearsay statements inculpating a defendant due to the strong incentive that a person arrested in incriminating circumstances has to shift blame onto others and curry favor with the authorities. Thus, the holding by the Virginia Supreme Court affirming admission of Mark Lilly's statements was plain constitutional error.

This Court has repeatedly "recognize[d] that th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . [S]uch a confession 'is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.'" *Lee*, 476 U.S. at 541 (citation omitted); *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting *Lee*); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) (noting the view that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest"); *Bruton v. United States*, 391 U.S. 123, 136 (1968); *see also Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring in part and in judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result) (stating that he "would be prepared to hold as a matter of due process that a confession of an accomplice cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption").

Indeed, the presumption that the custodial statements of a codefendant or accomplice implicating a defendant are unreliable is so strong that this Court has never countenanced their admission.[7] *See Lee*, 476 U.S. at 544-45; *Bruton*, 391 U.S. at 135-36; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). *See also New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring) (describing presumption as "weighty"). In *Douglas*, this Court reversed a conviction where the prosecutor read to the jury a confession made by the defendant's accomplice. Because the accomplice invoked his Fifth Amendment privilege when called to testify, the Court held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Douglas*, 380 U.S. at 419. "This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 541.

Similarly, in *Bruton*, this Court reaffirmed its concern with the grave distortion to the truthfinding process resulting from admission of an accomplice's confession implicating a criminal defendant. The Court held that admission of a codefendant's confession at a joint trial violated the defendant's rights under the Confrontation Clause, notwithstanding the trial judge's instruction to the jury that the confession was admissible only against the codefendant. The Court concluded that because a confession that incriminates the defendant is so "devastating" and "inevitably suspect," the risk that the jury would not follow instructions was too great to be ignored, underscoring that "[t]he unreliability of such evidence is intolerably compounded when the alleged

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7 *Dutton*, which upheld the introduction of the admission without cross-examination of hearsay statements of a non-testifying declarant incriminating the defendant, is not to the contrary. In *Dutton*, the hearsay was not "crucial" or "devastating," and, more important, it did not involve a confession made "in the coercive atmosphere of official interrogation" or result in a "wholesale denial of cross examination." 400 U.S. at 87.

accomplice . . . does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 135-36.

This Court in *Lee* reinforced the Constitutional underpinnings of such a result. In *Lee*, this Court stressed "the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." 476 U.S. at 546. The Court began its analysis by rejecting the "categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" *Id.* at 544 n.5. As the Court explained, "That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* Then, the Court determined that the presumption that the codefendant's confession could not be trusted as to the defendant's participation in the murders had not been rebutted. Specifically, the Court acknowledged the "reality of the criminal process . . . that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices," and that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.[8]

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8 Even the dissent in *Lee*, which would have concluded that the hearsay exception for declarations against interest is firmly established, recognized that "accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility -- circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest -- that we have viewed the accomplice's statements as 'inevitably suspect.'" *Lee*, 476 U.S. at 552 (Blackmun, J., dissenting).

Thus, this Court has consistently concluded that the statements of an accomplice or codefendant which are made during custodial interrogation and which incriminate a criminal defendant are inherently unreliable and therefore inadmissible under the Confrontation Clause. This time-honored principle is amply reflected in the decisions of the lower courts. Most Courts of Appeals addressing the issue have concluded that custodial statements like the one at issue in this case are inadmissible under the Confrontation Clause.[9] Only a few cases have permitted admission of a statement made while in custody and in response to police interrogation, but none involved a statement like the one at issue in this case which minimized the declarant's role or shifted blame to others.[10] And the vast majority of cases allowing admission of a statement

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9 *See Crespin v. State of New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998) (concluding there was no reason to depart "from time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable" where declarant "may reasonably have thought such a statement would decrease her practical exposure to criminal liability"); *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) (concluding that "there is a[] category of statements against penal interest that should generally be regarded as inadmissible under the Confrontation Clause, particularly where the declarant's unavailability is due simply to invocation of the Fifth Amendment in response to actual or potential prosecution, namely statements accusatory of another taken by law enforcement with a view to prosecution"); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (finding statements were not sufficiently against interest where made while in custody, constituted an attempt to curry favor from authorities and trivialized declarant's role by shifting blame to defendant and therefore could not be admitted under Confrontation Clause); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (concluding admission of statement by codefendant violated Sixth Amendment where made in response to custodial interrogation); *United States v. Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (finding admission of accomplice's confession implicating defendant violated Confrontation Clause); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir. 1982) (noting inherent unreliability of custodial statements implicating a third person, and concluding that statements of accomplice to police did not bear sufficient indicia of reliability); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (finding written confession made while in custody "may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to gain favor with the Government in the hope of obtaining release or reduced punishment"). *See also Williams v. State of Mississippi*, 667 So. 2d 15, 20-21(Miss. 1996) (noting "post-arrest statements made by one accused pointing the finger at another are as a matter of common experience among the least trustworthy of statements," and finding statement which "completely inculpated the defendant" inadmissible).

10 *See United States v. Keltner*, 147 F. 3d 662, 670 (8th Cir. 1998) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) (finding statement had

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inculpating a defendant have not involved statements to police.[11]

Accordingly, the decision of the Virginia Supreme Court flatly ignores this Court's Confrontation Clause jurisprudence, as well as that of the Courts of Appeals, which has consistently found custodial statements by an accomplice implicating a criminal defendant inherently unreliable. This Court should grant the petition to review and correct that error.

B. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.

There can be no legitimate question that this Court and others have uniformly rejected admission of statements of an accomplice or codefendant which are made during custodial interrogation and which implicate a criminal defendant as inherently unreliable and therefore inadmissible under the Confrontation Clause. This Court has done so without formally reaching – or needing to reach – the issue of whether the general category of declarations against penal

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particularized guarantees of trustworthiness where "entire statement inculpated both [defendant] and [declarant] equally" and "neither attempted to shift blame to his co-conspirators nor to curry favor from the police or prosecutor"); *State of Oregon v. Nielsen*, 853 P.2d 256, 263-64, 269-70 (Or. 1993) (finding statement reliable because it "admitted [declarant's] equally culpable involvement, rather than trying to shift blame").

11 *See, e.g., United States v. Moses*, No. 96-3632, 1998 WL 378812, *2 (3d Cir. July 9, 1998) (because statements were made to friend long before arrest, "there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses"); *Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994) (because statement was made to "a perceived ally, not to law enforcement officials," court concluded "it cannot be said that he made the statement in an effort to curry favor or in a coercive atmosphere"); *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993) (statements to informant which did not minimize declarant's culpability); *United States v. Harty*, 930 F.2d 1257, 1264-65 (7th Cir. 1991) (statements to informant made under circumstances where declarant had "strong motivation to recount events accurately"); *United States v. Layton*, 720 F.2d 548, 560 (9th Cir. 1983) ("[Jim] Jones's statements to [his lawyer and trusted advisor] were not made while in custody to curry favor with the police."); *United States v. Garris*, 616 F.2d 626, 632 (2d Cir. 1980) (pre-arrest statement which clearly implicated declarant but did not consistently inculpate defendant); *State of Oregon v. Wilson*, 918 P.2d 826, 837 & n.11 (Or. 1996) (noting that to whom the statement is made is an important factor and that declarant made statements implicating both declarant and defendant to a friend).

interest is a firmly rooted hearsay exception, describing the general category as "too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5. However, the sub-category of that general category at issue here – limited to custodial statements by an accomplice inculpating a criminal defendant – involves statements that are inherently unreliable and are not even within a proper hearsay exception at all under this Court's caselaw, much less a firmly rooted exception.

Four years ago, in a case involving the scope of the hearsay exception for statements against penal interest, this Court expressly declined to decide whether the hearsay exception for statements against penal interest is firmly rooted for Confrontation Clause purposes. *Williamson*, 512 U.S. at 605. In so doing, however, this Court made crystal clear that statements of an accomplice which incriminate a defendant are not within the hearsay exception of Rule 804(b)(3) of the Federal Rules of Evidence. Citing its oft-repeated conclusion that custodial post-arrest statements of a codefendant have traditionally been viewed with special suspicion and considered less credible than ordinary hearsay evidence, the Court concluded that a "district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." *Id.* at 601. With respect to the particular statements at issue, the Court could not "conclude that all that Harris said was properly admitted." *Id.* at 604. Specifically, the Court concluded that "parts of [Harris'] confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability . . . ." *Id.* Because neither the district court nor the Court of Appeals had inquired whether each of the statements in Harris' confessions was truly self-inculpatory, the Court remanded for this assessment to be made. *Id.*

Three Courts of Appeals, expressly following this Court's teachings in *Lee*, *Bruton*, and *Douglas*, have held that the exception for declarations against interest cannot be deemed firmly rooted as applied to statements by an accomplice which incriminate a defendant. *Earnest v.*

Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996); *United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993); *Olson v. Green*, 668 F.2d 421, 427 & nn. 10, 11 (8th Cir. 1982) ("United States Supreme Court decisions, as well as decisions from the courts of appeals, indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."). As the Tenth Circuit recently concluded:

> Generally, evidence is presumptively reliable if it comes within a firmly rooted hearsay exception. [The codefendant's custodial] statement . . . cannot be immunized by the exception for statements against interest. Although it is a statement against penal interest . . . , the Supreme Court has held that in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee v. Illinois*, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 2064 n.5, 90 L. Ed. 2d 514 (1986). Moreover, custodial confessions "have traditionally been viewed with special suspicion." *Id.* at 541, 106 S. Ct. at 2062. Therefore, [the codefendant's] statement was "presumptively unreliable," *id.*, and was admissible against [the defendant] only if the state demonstrated "particularized guarantees of trustworthiness. *Id.* at 543, 106 S. Ct. at 2063.

Earnest, 87 F.3d at 1131.[12]

Six other Courts of Appeals, along with the Virginia Supreme Court, however, have suggested that the general category of hearsay exceptions for declarations against penal interest is firmly rooted, and have applied that general exception to a broad category of statements. *United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998); *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir. 1991); *Jennings v. Maynard*, 946 F.2d 1502, 1505-06 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir.

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12 The Fifth Circuit in *Flores* further doubted that, from a historical perspective, the exception could fairly be deemed firmly rooted. 985 F.2d at 776 n.13. Noting that the common law did not recognize an exception for statements against penal interest, and that it was not until 1975 that the Federal Rules permitted admission of statements against penal interest, the court concluded that "[t]he relatively recent recognition of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation in cases of the present kind." *Id.* at 778-79.

1989) (concluding that the exception "would seem to be 'firmly rooted'"); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983).

However, as noted above, the proper inquiry is not whether there is a firmly rooted general hearsay exception covering declarations against penal interest. Rather, the proper constitutional analysis is whether the admission of a custodial confession by an accomplice inculpating a defendant falls within a firmly rooted hearsay exception. Whatever can be said about the status of the general exception for declarations against penal interest, there is no hearsay exception lawfully covering custodial confessions by an accomplice inculpating a defendant. *See Williamson*, 512 U.S. at 601, 604-05.

This Court should also grant the petition and issue a writ of certiorari to ensure that the Circuit Courts of Appeals and the state courts of last resort uniformly follow this Court's conclusion in *Lee* that the general category of statements against penal interest is "too large a class for meaningful confrontation clause analysis," 476 U.S. at 544 n.5, and to resolve the split in authority as to whether the statements of an accomplice incriminating a defendant fall within a firmly rooted hearsay exception.

C. Mark Lilly's Post-Arrest Statements Implicating Petitioner Are Inadmissible Because They Do Not Bear Particularized Guarantees Of Trustworthiness.

Because Mark Lilly's custodial statements are inherently unreliable, they were inadmissible unless their reliability is supported by "particularized guarantees of trustworthiness." *Wright*, 497 U.S. at 815; *see also Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). In *Wright*, this Court held that the particularized guarantees of trustworthiness include **only** those circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 819. This Court premised its holding on the rationale for permitting exceptions to the hearsay rule. As the Court reasoned, the various hearsay exceptions are founded on circumstantial guarantees of trustworthiness "that existed at the time the statement was made and do not include those that may be added by using hindsight," and the same should apply under the

Confrontation Clause. *Id.* at 820 (citation omitted). This Court specifically prohibited consideration of corroborating evidence because it "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility." *Id.* at 823. Accordingly, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

Here, the circumstances surrounding the making of Mark Lilly's statements implicating Petitioner completely undermine their reliability. Indeed, no court, apart from the Virginia Supreme Court, has ever admitted uncross-examined hearsay statements inculpating a criminal defendant that were made while in custody and in response to police interrogation, minimized the declarant's role in the offenses while consistently shifting responsibility to others, and accepted responsibility for a significantly less serious offense than the one in which the defendant was implicated. Despite this Court's clear prohibition on the use of corroborating evidence to establish particularized guarantees of trustworthiness, moreover, the Virginia Supreme Court expressly ignored the indicia of "inherent trustworthiness" of Mark Lilly's statements – because there were none – and instead considered other allegedly corroborating evidence presented at trial. That decision merits review by this Court for at least two reasons: first, indicia of inherent trustworthiness of the statements by Mark Lilly – the only indicia permitted to be considered by this Court's rulings – concededly were entirely lacking; and second, certain Courts of Appeals and state courts of last resort, including the Virginia Supreme Court, permit the use of corroborating evidence of reliability, contrary to this Court's holding in *Wright* limiting the inquiry to inherent trustworthiness, and not by reference to other evidence at trial.

1. Inherent Indicia

It is not surprising that the Supreme Court of Virginia ignored the circumstances surrounding the making of Mark Lilly's statements to police. Those circumstances belie any guarantees of trustworthiness and, in fact, confirm the statements' inherent unreliability. Mark Lilly made his statements after having been arrested and held in custody for several hours,[13] and his statements were not spontaneous, but instead were made in response to police interrogation by several officers over the course of more than an hour. This Court and lower courts have consistently recognized that such circumstances render statements unreliable.[14]

More important, as this Court has concluded, having been arrested and subjected to interrogation regarding a number of robberies and a murder, Mark Lilly had a tremendous incentive to minimize his own role and to shift or spread blame, curry favor, avenge himself or divert attention to another. *Lee*, 476 U.S. at 545; *Williamson*, 512 U.S. at 604 (noting that a

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13 Although Mark Lilly was apprised of his rights under *Miranda*, his statements are unreliable because they were made before he had any contact with an attorney or his family. *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (finding statement unreliable in part because "McMahon gave his statement while in custody at the Brooklyn House of Detention before he had the benefit of counsel.").

14 *See Dutton*, 400 U.S. at 87 (distinguishing inculpatory statement of a declarant to a fellow prisoner from those made "in the coercive atmosphere of an official interrogation"); *id.* at 88-89 (concluding spontaneity of statement provided indicia of reliability); *Chambers*, 410 U.S. at 300 (same); *United States v. Costa*, 31 F.3d 1073, 1079 (11th Cir. 1994) (finding statement unreliable in part because not a spontaneous declaration to friends or confederates but a custodial confession); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (finding statement not reliable in part because "declarant made no spontaneous utterance; his oral confession was made in response to custodial interrogation"); *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981) (noting statements made while in custody and in response to police questioning); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981) ("More importantly, the statement was made while Pfaff was in police custody in response to police questioning."); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981) ("This was not a spontaneous declaration made to friends and confederates, but a custodial confession, given under potentially coercive circumstances . . . ."); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (finding statement unreliable in part because "[a]t the time when Oliver gave his statement to the FBI agent he was under arrest, facing a probable long term prison sentence for a bank robbery"); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) (finding statement unreliable in part because made while in custody).

reasonable person in such a situation "might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than people who are running the show . . . especially if the small fish are willing to help the authorities catch the big ones") (citations omitted). *See also, e.g., Flores*, 985 F.2d at 782 (concluding that "statements by suspects to law enforcement officials inculpatory of third parties are excluded because of the *presumption* that [the] motive[] [to shift the blame to others so as to receive a lesser sentence] exist[s]"); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981) ("There is a very real danger that the motivation for the revelation [implicating the defendant] may not have been to further truth, but rather to curry favor with the authorities.") (citation and internal quotation marks omitted).

Mark Lilly's statements to police bear this incentive out, consistently exculpating himself and inculpating others. Mark Lilly effectively said to the authorities that while he had gotten painfully drunk and stolen some beer, Petitioner and Barker had engaged in a rampant crime spree throughout several Virginia counties. He trivialized his role to the point that he appears something of a bystander who merely happened to be present when the various crimes were committed, contrary to the testimony of Barker, which, as noted above, portrayed Mark Lilly as more active in the murder and the robberies. He shifted virtually all responsibility for criminal conduct onto Barker and Ben Lilly, identifying Barker as being responsible for the robberies and Ben Lilly as being responsible for the carjacking and shooting. His statements, accordingly, cannot be considered truly self-inculpatory, and therefore cannot be deemed reliable. *See, e.g., United States v. Innamorati*, 996 F.2d 456, 475 (1st Cir. 1993) (finding inadmissible a co-defendant's statement that "admitted to a few acts of logistical assistance" while maintaining that "others were guilty of wrongdoing from which [the declarant] had been excluded but happened to have some knowledge" because the statement was not contrary to the declarant's self-interest at the time the statement was made); *Flores*, 985 F. 2d at 782 ("Taking on the full blame for a minor role in an offense, such as claiming to be a mere courier in a drug conspiracy, does little to demonstrate trustworthiness because the declarant still has the motive to shift the blame to others

so as to receive a lesser penalty."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (finding statements unreliable where they "trivialized [the declarant's] role in the drug conspiracy by pointing to Magana as the 'kingpin'"); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) (finding inadmissible a co-defendant's statement to police because the declarant, fearing prosecution for aiding and abetting, "may well have believed it was in her best interest to make a statement implicating [the defendant] as the instigator in order to ingratiate herself with the F.B.I. and divert attention to another").

To the extent, moreover, that Mark Lilly implicated himself in any crimes, such as the robbery of the residence the night before the murder, that he inculpated Petitioner in a significantly more serious crime further undermines the reliability of his statements. *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981) (concluding that the declarant's admitting culpability for a crime that is significantly less serious than the crime for which the declarant is inculpating the defendant is a factor indicating the unreliability of the statement in question). Finally, Mark Lilly's repeated references to his drunkenness as an explanation for his lack of memory and his participation in the crimes likewise undermine the reliability of his statements. *Crespin v. State of New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998) (finding statement unreliable in part because declarant stated she could not remember the extent of her participation in the crimes because she had been in a "drunken state" at the time).

Thus, based on the circumstances surrounding the making of Mark Lilly's statements, the only indicia of reliability to be assessed under this Court's case law in determining their inherent trustworthiness, those statements should not have been admitted because they were not supported by particularized guarantees of trustworthiness. Indeed, no Court of Appeals has ever admitted a post-arrest custodial statement which is made in response to police questioning and which minimizes the declarant's role in the criminal activity while shifting responsibility onto others. Accordingly, because Mark Lilly's statements were inherently unreliable, their admission violated Lilly's critical constitutional rights to confront the witnesses against him, and denied him the opportunity to cross-examine Mark Lilly, challenge his credibility, and test the veracity of

evidence that so severely incriminated him and likely resulted in his conviction for first-degree murder and his death sentence.

2. The Split in the Circuits and Courts of Last Resort Regarding the Use Of Corroborating Evidence

In *Williamson*, this Court noted that the Courts of Appeal are divided regarding the use of corroborating evidence to establish a statement's reliability. 512 U.S. at 605. In fact, only three Circuit Courts of Appeals currently follow the standard set forth by this Court in *Wright* and hold that the hearsay statement at issue must be evaluated independent of any other evidence introduced at trial, while four others allow review of other evidence introduced at trial to gauge the veracity of the statement at issue. *See Flores*, 985 F.2d at 775 (stating that the Supreme Court of the United States held in *Wright* that "corroborating evidence may not be considered in determining whether a statement may be admitted under the Confrontation Clause where . . . the statement is presumed to be unreliable"); *United States v. Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (concluding district court improperly admitted grand jury testimony of the defendant's accomplices after finding "significant in its reliability analysis the fact that the hearsay testimony . . . was corroborated" by other evidence); *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir. 1991) (stating that hearsay statements made by the defendant's accomplice "must be inherently reliable because of the circumstances surrounding" the making of the statements). *But see United States v. Garris*, 616 F.2d 626, 632-33 (2d Cir. 1980) (finding hearsay statements made by the defendant's sister to an F.B.I. agent during an interview at F.B.I. headquarters admissible in part because her statements were corroborated by the testimony of other witnesses at trial); *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978) ("[T]he trustworthiness of a [hearsay] statement should be analyzed by evaluating not only the *facts corroborating the veracity of the statement*, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.") (emphasis added); *United States v. Keltner*, 147 F.3d 662, 670-71 (8th Cir. 1998) (finding admissible as a declaration against interest a statement made by a

co-conspirator to F.B.I. agents, who offered the declarant early release from prison and immunity for several other crimes in exchange for his cooperation, because "[t]he information [the declarant] gave to the F.B.I. was supported by corroborating circumstances"; *United States v. Candoli*, 870 F.2d 496, 510 (9th Cir. 1989) (finding an inculpatory hearsay statement admissible due to other corroborating evidence introduced at trial and noting that "those circuits which have read 'the corroboration expressly required for exculpatory statements into the rule as applied to inculpatory statements [have done so] in order to satisfy the confrontation clause'") (citation omitted).

The state courts are similarly divided. *Compare Chandler v. Commonwealth of Virginia*, 455 S.E.2d 219, 224 (Va. 1995) ("[T]he reliability of . . . [the] statement is buttressed by the testimony of [another co-defendant], which placed [the declarant] in the vehicle during the commission of the robbery and murder.") *and Brown v. State of Wyoming*, 953 P.2d 1170, 1179 (Wyo. 1998) (post-arrest statement bore adequate indicia of reliability, in part because of corroborating evidence, and therefore admission did not violate the Confrontation Clause because particularized guarantees of trustworthiness were met) *and State of Ohio v. Gilliam*, 635 N.E.2d 1242, 1245-46 (Ohio 1994) (in-custody statement that was corroborated by independent evidence met the trustworthiness requirement of 804(b)(3) and therefore did not violate confrontation clause because it was admitted pursuant to a firmly rooted exception to the hearsay rule) *with Simmons v. State of Maryland*, 636 A.2d 463, 470 (Md. 1994) ("The State goes on to look to the testimony of the victims as corroborating [the declarant's] statement. This it may not do.") *and State of Nebraska v. Hughes*, 510 N.W.2d 33, 39 (Neb. 1993) (in-custody confession was not admissible because the state failed to overcome the presumption of unreliability in light of the totality of the circumstances surrounding the making of the statement).

This Court should also grant the petition and issue a writ of certiorari to ensure that the Circuits and state courts of last resort are uniform in following the mandate of *Wright* that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must

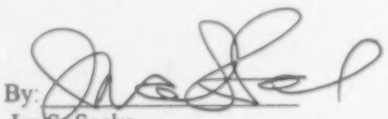
possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright*, 497 U.S. at 822.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 2, 1998

Respectfully submitted,



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OCTOBER TERM, 1998

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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ness licenses, and paying the meal tax bond. Thus, had the building permit been denied, the same legal question could have been raised.

[3] We also reject the Board's contention that the circuit court erred in considering other sections of the zoning ordinance, specifically the definition of "used or occupied" in § 1–4.8. The circuit court did not *apply* this definition to § 12–9. Rather it looked to this section and others in the ordinance to determine the purpose and intent of the zoning ordinance, specifically § 12–9. This reference to other provisions *in pari materia* with the section at issue is an accepted method of statutory construction and did not constitute error by the circuit court. *See Prillaman v. Commonwealth*, 199 Va. 401, 405–06, 100 S.E.2d 4, 7–8 (1957).

[4, 5] Finally, we reject the Board's assertion that the circuit court erred by failing to extend the presumption of correctness to the Board's decision. It is well established that the decision of a board of zoning appeals is presumed to be correct and will be reversed or modified only if the board applied erroneous principles of law or was plainly wrong and in violation of the purpose and intent of the zoning ordinance. *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 804–05 (1994). Furthermore, great weight must be given to the consistent construction of an ordinance by the official charged with enforcing the ordinance. *Cook v. Board of Zoning Appeals of the City of Falls Church*, 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992).

In support of its position, the Board only points again to those actions of the circuit court to which it assigned error: ignoring the testimony of the neighborhood resident, relying on the issuance of the building permit, and referring to other sections of the zoning ordinance in interpreting § 12–9. We have already held that the circuit court did not err in any of these particulars and we find nothing else in the record to suggest that, in reaching its decision, the circuit court ignored any of the principles which govern its review of the Board's decision in this case.*

Accordingly, for the reasons stated, we will affirm the decision of the circuit court.

Affirmed.

Benjamin Lee LILLY

v.

COMMONWEALTH of Virginia.

Record Nos. 972385, 972386.

Supreme Court of Virginia.

April 17, 1998.

Defendant was convicted in the Circuit Court, Montgomery County, Ray W. Grubbs, J., of capital murder and was sentenced to death. Defendant appealed. The Supreme Court, Koontz, J., held that: (1) defendant was not entitled during voir dire to "educate" jurors on issue of parole ineligibility of defendants upon whom life sentences are imposed; (2) defendant was not entitled to excusal for cause of juror who was police officer-witness's second cousin; (3) permitting Commonwealth to display enlarged "in life" photograph of victim to jury during guilt phase was not abuse of discretion; (4) defendant's accomplice's statement to police was admissible as declaration against accomplice's penal interest; (5) defendant's incriminating statement to police chief did not occur during custodial interrogation; (6) evidence that dried blood was found on back of defendant's pant leg was admissible; (7) refusal to strike testimony of witness who allegedly violated sequestration order was not abuse of discretion; (8) defendant was not entitled to jury instruction on voluntary intoxication; and (9) defendant was not entitled to penalty phase instruction directing jury to "impose the low-

* We are not called upon to consider whether the circuit court's interpretation of § 12–9 is correct because the validity of that interpretation was not the subject of an assignment of error.

er grade" of punishment if there was reasonable doubt as to grade.

Affirmed.

1. Jury ⇐131(4)

A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity.

2. Jury ⇐131(1)

Capital murder defendant was not entitled during voir dire to "educate" jurors on issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases.

3. Criminal Law ⇐1134(5)

In considering claim that jurors should not have been excused for cause, Supreme Court considers voir dire as whole, not just isolated statements.

4. Criminal Law ⇐1158(3)
Jury ⇐85

The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error.

5. Jury ⇐108

Three jurors who expressed strong moral or religious reservations about their abilities to impose sentence of death, but who, with some continuing equivocation, ultimately stated that they could follow trial court's instructions, were properly removed for cause in capital murder case.

6. Jury ⇐33(2.15)

Removal for cause of three jurors who were adamant in their personal opposition to capital punishment and could not impose death sentence did not violate capital murder defendant's right to be tried by impartial jury selected from representative cross-section of community. U.S.C.A. Const.Amend. 6.

7. Jury ⇐90

Refusal to excuse for cause juror who stated during voir dire that he was acquainted with police chief, to whom defendant made incriminating statement, was not manifestly erroneous in capital murder case, even though juror also stated that he might give more credence to chief's testimony; upon further examination, juror stated that he could set aside his acquaintance with chief and consider testimony of all witnesses on equal plane.

8. Jury ⇐90

Refusal to excuse for cause juror who stated during voir dire that he was second cousin and "real good friend" of law enforcement official who was prospective witness for Commonwealth was not manifestly erroneous in capital murder case; juror testified that such relationship and friendship would not be factor in considering that official's testimony against that of other witnesses.

9. Jury ⇐100

Capital murder defendant was not entitled to excusal for cause of juror who had read newspaper article about defendant's past; juror testified that article had not prejudiced her.

10. Jury ⇐83(1)

It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case.

11. Jury ⇐90

Investigator who was potential witness for prosecution in murder case, and whose role in investigation of murder was significant to prosecution's case, was not "party" to that case; thus, defendant was not entitled to excusal for cause of juror who was investigator's second cousin, and who stated that such relationship and friendship would not be factor in considering investigator's testimony against that of other witnesses. Code 1950, § 8.01-358; Sup.Ct.Rules, Rule 3A:14(1).

See publication Words and Phrases for other judicial constructions and definitions.

12. Jury ⇐90

Even though victim is not party to proceeding, person is disqualified from serving as juror if he is related to victim. Code 1950, § 8.01-358; Sup.Ct.Rules, Rule 3A:14(1).

13. Jury ⇐90

When a law enforcement officer's sole role in a criminal prosecution is as a witness, he is not a "party" to that case; thus, a juror's relationship to such a police officer-witness does not require per se dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly.

14. Criminal Law ⇐126(2)

Capital murder defendant was not entitled to change of venue on ground that pretrial publicity had potentially prejudiced members of venire; selection of jury panel had not proved difficult, with fewer than half of jurors stating that they had heard or read about case, and with none showing particular bias as result of pre-trial publicity.

15. Criminal Law ⇐134(1)

A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred.

16. Criminal Law ⇐134(1)

In order to overcome the presumption that the defendant will receive a fair trial in the jurisdiction in which the offense occurred, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial.

17. Criminal Law ⇐121

The decision whether to grant a change of venue lies within the sound discretion of the trial court.

18. Criminal Law ⇐126(1)

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue.

19. Criminal Law ⇐126(1)

In determining whether media reports about the accused and the crime require a change of venue, the trial court should consider the difficulty encountered in selecting a jury as a significant factor in determining whether actual prejudice has resulted from the publicity.

20. Criminal Law ⇐715

Permitting Commonwealth to display enlarged "in life" photograph of victim to jury during guilt phase of capital murder trial was not abuse of discretion, despite claim that photo was inherently prejudicial because it tended to invoke sympathy for victim.

21. Criminal Law ⇐438(4, 5.1, 8)

Neither admission of photographs depicting crime scene of murder, including graphic images of victim, nor trial court's denial of defendant's request that black-and-white photographs be substituted for color photographs, was error during guilt phase of capital murder trial; court reviewed photographs proffered as potential exhibits by Commonwealth and excluded autopsy photographs, which it found excessively graphic, crime scene photographs accurately depicted scene of crime, and probative value of color photographs outweighed potential prejudice of their content.

22. Criminal Law ⇐438(4)

A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime.

23. Criminal Law ⇐438(5.1), 1153(1)

The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion.

24. Criminal Law ⇐438(8)

Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime.

25. Criminal Law ⇐438(8)

If a videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking.

26. Criminal Law ⇐438(8), 1153(1)

As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion.

27. Criminal Law ⇐422(5)

Capital murder defendant's accomplice's statement to police, implicating defendant as triggerman in murder, was admissible as declaration against accomplice's penal interest when he invoked his right against self-incrimination under Fifth Amendment, despite defendant's claim that such statements were self-serving and tended to exculpate accomplice by shifting responsibility to defendant and third party for majority of criminal acts those three committed; accomplice was cognizant of import of his statements and that he was implicating himself as participant in numerous crimes for which he could be charged, convicted, and punished, and elements of his statements were independently corroborated. U.S.C.A. Const.Amend. 5.

28. Criminal Law ⇐417(15)

To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant.

29. Criminal Law ⇐417(15)

A declarant is unavailable, for purposes of the hearsay exception for an out-of-court statement against penal interest by an unavailable declarant, if the declarant invokes the Fifth Amendment privilege to remain silent. U.S.C.A. Const.Amend. 5.

30. Criminal Law ⇐417(15)

For an out-of-court statement to be considered as being against the unavailable declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein; rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable.

31. Criminal Law ⇐417(15)

In determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given.

32. Criminal Law ⇐662.11

Admission of capital murder defendant's accomplice's statement to police, implicating defendant as triggerman in murder, as declaration against accomplice's penal interest did not violate defendant's right to confront and cross-examine accomplice, who exercised his Fifth Amendment privilege against self-incrimination; accomplice's statement bore sufficient indicia of reliability. U.S.C.A. Const. Amends. 5, 6.

33. Criminal Law ⇐662.1, 662.8

The right of confrontation is not absolute; thus, a statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. U.S.C.A. Const.Amend. 6.

34. Criminal Law ⇐1166(10.10)

Assuming that discovery motion and subsequent order of trial court required prosecution to disclose duplicate tapes of defendant's accomplice's recorded statement to police, rather than merely disclosing transcripts of that recording, defendant was not prejudiced by Commonwealth's failure to disclose duplicate tapes; defendant was supplied with accurate transcripts of recording prior to trial, and was offered opportunity to review recordings before they were played to jury.

35. Criminal Law ⇐412.1(1, 4)

Conversation in which capital murder defendant, before having been informed of his right to counsel and his right against self-incrimination, said "me" when police chief asked him "what does a murderer look like anyway?" was not custodial interrogation; defendant initiated conversation, and statement was voluntary. U.S.C.A. Const.Amends. 5, 6.

36. Criminal Law ⇐412.1(1)

Police chief was not precluded from testifying in capital murder trial that defendant said "me" when police chief asked him "what does a murderer look like anyway?", despite defendant's claim that such testimony was unreliable since in preliminary testimony chief testified only that he "thought" defendant had said "me"; chief testified at trial that he was certain of what defendant said, and defendant was not prohibited from cross-examining chief concerning his certainty as to statement.

37. Criminal Law ⇐1169.12

Even if law enforcement officer's testimony that capital murder defendant declined to submit to gunpowder residue test, which defendant was erroneously told was voluntary, violated defendant's right against self-incrimination, any error was harmless; because evidence showed that defendant fired one or more guns taken in breaking and entering prior to murder, jury was aware that gunpowder residue test would have been positive for that reason alone. U.S.C.A. Const.Amend. 5.

38. Criminal Law ⇐393(1)

Capital murder defendant's act of rubbing his hands together in apparent attempt to destroy any gunpowder residue on his hands, after being asked to take gunpowder residue test that he was erroneously told was voluntary, was nonverbal act that went beyond mere refusal to submit to test and, as such, was not subject to exclusion under right against self-incrimination. U.S.C.A. Const.Amend. 5.

39. Homicide ⇐174(2)

Evidence that dried blood was found on back of capital murder defendant's pant leg was admissible, even though Commonwealth alleged defendant was facing victim at time of shooting, and despite claim that, because no test was conducted to determine whether blood was of human origin, it was as likely that blood came from geese defendant and his associates shot earlier in day; presence of bloodstains was probative, however slightly, of defendant's involvement in murder, and lack of scientific determination that blood was from human source was matter of weight and credibility, if any, of that evidence for jury to consider.

40. Criminal Law ⇐1169.1(10)

To extent, if any, that contents of medical examiner's report on murder victim contained references to tests not performed by proponent of report, and thus fell outside exception to hearsay rule provided for medical examiners' reports, its admission was harmless; defendant failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence. Code 1950, § 19.2-188.

41. Criminal Law ⇐1036.1(9)

Capital murder defendant failed to preserve for appellate review his claim that trial court erred by refusing to admit statement made by defendant's associate, who was with defendant at time of murder, that associate would be able to kill his best friend and feel no remorse; defendant initially objected to statement's admission, then later sought its admission over Commonwealth's objection, and after Commonwealth subsequently withdrew its objection, trial court reversed its ruling to exclude statement, but defendant failed to recall witness.

42. Criminal Law ⇐665(6)

Refusal to strike testimony of witness who was not aware of witness sequestration order, and who testified that exposure to newspaper article did not affect his testimony, was not abuse of discretion.

43. Criminal Law ⇐665(1)

Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court.

44. Homicide ⇐294.2

Capital murder defendant was not entitled to jury instruction on voluntary intoxication, as his actions suggested that he was fully in command of his faculties and acted with deliberation; he was able to operate automobile both before and after murder, and during his flight immediately after murder he committed robberies to facilitate his continued flight and took steps to deliberately conceal his involvement in murder.

45. Homicide ⇐28

Only exception to general rule that voluntary intoxication is not excuse for any crime is that when person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit class of murder that requires proof of deliberate and premeditated killing; mere intoxication, however, will not negate premeditation.

46. Criminal Law ⇐796

It is inappropriate in penalty phase of capital trial to direct jury to consider "residual doubt" of guilt in considering sentence.

47. Homicide ⇐311

Capital murder defendant was not entitled to penalty phase instruction directing jury to "impose the lower grade" of punishment if there was reasonable doubt as to grade of punishment to be imposed; this instruction was both confusing and redundant of instruction already accepted by trial court which directed jury that Commonwealth was required to present evidence beyond reasonable doubt of existence of one or both of aggravating factors necessary for imposition of death penalty.

48. Criminal Law ⇐1134(3)

In conducting its proportionality review in a death penalty case, the Supreme Court must determine whether other sentencing bodies in the jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code 1950, § 17–110.1, subd. C, par. 2.

Max Jenkins; Christopher A. Tuck (Jenkins & Jenkins, on briefs), Radford, for appellant.

Katherine P. Baldwin, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Benjamin Lee Lilly (Lilly). Lilly was also convicted of lesser offenses arising out of the same occurrence, but does not directly challenge the sufficiency of the evidence to support his convictions for the lesser offenses.

I.

PROCEEDINGS

On April 1, 1996, indictments were returned against Lilly charging that on December 5, 1995, Lilly abducted and robbed Alexander V. DeFilippis, Code §§ 18.2–47 and 18.2–58, carjacked DeFilippis' vehicle, Code § 18.2–58.1, and subsequently murdered DeFilippis as part of the commission of the robbery, Code § 18.2–31(4). Lilly was also charged with use of a firearm in the principal offenses and for possession of a firearm after having previously been convicted of a felony. Code §§ 18.2–53.1 and 18.2–308.2(A)(i).

Lilly filed pre-trial motions to exclude evidence of a statement he made to Pearisburg Police Chief William Whitsett, to permit voir dire of jurors concerning parole ineligibility issues,[1] to exclude evidence of Lilly's refusal to submit to a paraffin gunpowder residue test, and for a bill of particulars. Lilly also sought to exclude from evidence statements made by Mark Lilly, Lilly's brother and a co-participant in these crimes, asserting that their admission would be a violation of the hearsay rule and of the confrontation clause. The trial court denied all of these motions. Lilly also filed a motion for a change of venue, which the trial court took under advisement pending selection of the jury.

Lilly also filed a discovery request seeking, *inter alia*, "[a]ll alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator ... in every media in which each such confession or statement may exist." The trial court granted the discovery motion and the Commonwealth supplied Lilly with, among other items, transcripts of the tape-recorded statements of Mark Lilly.

Jury selection began on October 15, 1996 and continued over four days. Trial commenced on October 21, 1996 and proceeded for five days, concluding with a jury verdict finding Lilly guilty on all counts of the indictments. The penalty phase of the trial occurred on October 28, 1996, concluding with a jury recommendation of a sentence of death for the capital murder charge and two life terms plus a total of 27 years for the lesser offenses. The trial court entered judgment on the jury's verdict and imposed the sentences by final order dated March 7, 1997.

1. In addition, Lilly sought to argue parole ineligibility as a mitigating factor and to submit jury instructions on this issue during the penalty phase. The trial court granted these portions of the motion.

II.

EVIDENCE

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265, *cert. denied*, — U.S. —, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). Gary Wayne Barker, the Commonwealth's principal witness, shared a room with Mark Lilly. Barker testified that on the day before the murder, he, Lilly, and Mark Lilly were at Lilly's home "drinking" and smoking marijuana. Later, the three men drove to a friend's house to "drink a little bit with him." When they discovered that the friend was not at home, the three men broke into the house and stole several guns, a safe, and a quantity of liquor. They subsequently broke open the safe and divided its contents.

The three men then drove to Radford where they tried unsuccessfully to trade the stolen guns for marijuana. They then went to stay at the home of an acquaintance in Blacksburg. During this time they continued to drink and smoke marijuana.

The following morning, the three men drove over the back roads in the vicinity of Shawsville and Elliston, stopping to fire the stolen guns at some geese and killing one, which they put in the trunk of the car. They again attempted to trade the guns for marijuana at a trailer park and a bar in Blacksburg.

Near Heathwood, the car in which the three men were travelling broke down in the vicinity of a convenience store. They removed the liquor and guns from the car. DeFilippis, who had driven to the store with a friend, was inspecting a tire on his vehicle while his friend went into the store. Lilly, carrying one of the stolen guns, confronted DeFilippis and called for Barker and Mark Lilly to join him. Lilly ordered DeFilippis into DeFilippis' car and Mark Lilly and Barker also got into the vehicle. Lilly then drove the vehicle away from the store and ordered DeFilippis to surrender his wallet.

Lilly drove DeFilippis' car to an isolated point on the bank of the New River near Whitethorne, stopped the car, and ordered DeFilippis to get out. Mark Lilly was carrying one of the stolen guns, a pistol. The other guns were left in the car. Lilly ordered DeFilippis to strip to his underwear and walk away from the car. After throwing DeFilippis' clothing into the river, the three men returned to the car. Lilly took the pistol from Mark Lilly, ran up to DeFilippis, turned him around, and shot him four times, fatally striking him three times in the head and once in the arm.

Lilly returned to the car, leaving DeFilippis' body in the road. Barker and Mark Lilly asked Lilly why he had shot DeFilippis. He replied that DeFilippis had seen Lilly's face and that "I ain't going back" to the penitentiary.

The three men bought beer with the money they had stolen from DeFilippis and then drove to the McCoy River where they disposed of "anything that might have our prints on it," although they retained the murder weapon and the other guns. They then drove to "a little market" in Giles County, where they robbed the owners of cash and some merchandise.

Determining that the money from this robbery was not sufficient "[t]o get us out of ... town," they drove to another store, also in Giles County. Barker and Mark Lilly entered that store and attempted to rob the clerk. They were interrupted by the owner who grabbed Barker. Barker broke free and the two men fled to the car. The owner followed them as Lilly drove away. Barker fired one of the guns into the air to let the

owner know that they were armed, and he ended his pursuit.

A short time later, the car broke down. As the three men were removing the stolen merchandise from the car, police officers arrived. The three men fled on foot, with Barker and Lilly being captured almost immediately.

One of the officers responding to the report of these robberies was Police Chief Whitsett. While Lilly was sitting in a police car and Whitsett was standing nearby, Lilly asked Whitsett to place his shotgun in Lilly's mouth and pull the trigger. Whitsett refused and asked Lilly "if I looked like a murderer?" In reply to a comment made by Lilly, Whitsett then asked, "what does a murderer look like anyway?" Lilly replied, "me."

Barker and Mark Lilly both told the police about the DeFilippis murder in their statements. In his initial statement to police, Lilly did not mention the murder and maintained that the other two men had forced him to participate in the robberies.

We will recite other relevant facts and proceedings within the discussion of the assignments of error.

III.

ISSUES PREVIOUSLY DECIDED

Lilly has assigned error to the trial court's failure to order the Commonwealth to provide a general bill of particulars prior to trial, as well as a bill of particulars of the aggravating factors upon which the Commonwealth would rely during the penalty phase of the trial. Lilly has further assigned error to the trial court's finding that the Virginia death penalty statute is not unconstitutional. The arguments raised in these assignments of error have been thoroughly addressed and rejected in numerous prior capital murder cases. We find no reason to modify our previously expressed views on these issues. *Clagett*, 252 Va. at 85–86, 472 S.E.2d at 266–67.

IV.

JURY SELECTION

[1] Lilly assigns error to the trial court's refusal to allow him to depart from the trial court's approved list of questions during voir dire. The record shows that the trial court and counsel for the defense and the Commonwealth conferred extensively in advance of the voir dire concerning the questions to be asked of potential jurors. Lilly has failed to identify any question he was not allowed to ask or to show that any potential juror was not fully questioned. A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity. *Buchanan v. Commonwealth*, 238 Va. 389, 401, 384 S.E.2d 757, 764 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). Lilly has failed to demonstrate that he was in any way prejudiced by the trial court's limiting of the questions which could be put to prospective jurors, and we will not disturb the trial court's determination in this matter. *Id.*

[2] Lilly further asserts that the trial court erred in refusing to permit him to "educate" the jurors on the issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases. He contends that the requirement of *Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994), that the trial court instruct the jury on parole ineligibility requires that the venire be informed on this issue at the outset of trial and that individual jurors may be questioned on their views of this issue. We disagree.

The clear import of *Simmons* is that, once a defendant is convicted of a capital crime, he has, as a matter of due process, the right to have the jury informed of his ineligibility for parole in order that this factor may be weighed by the jury against the finding of his further dangerousness to society. Nothing in *Simmons* even remotely suggests that knowledge of parole ineligibility rules and exploration of potential jurors' opinions on that subject would be a proper topic for voir dire.[2] The probable confusion and prejudice such an inquiry would cause in the minds of jurors is self-evident. Accordingly, we reject Lilly's contention that he should have been permitted to "educate" and examine the venire on this issue.

Lilly assigns error to the trial court's dismissal for cause of six members of the venire. Each of the prospective jurors expressed strong moral or religious reservations about her ability to impose a sentence of death. Three of the jurors, Connie Huffman, Kristina Mitchell, and Ollie Jones, ultimately agreed, but with some continuing equivocation, that they could follow the trial court's instructions.

[3] In asserting that these jurors should not have been excused, Lilly confines his argument to a discrete portion of the examination of each of them. We must consider the voir dire as a whole, not just isolated statements. *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

[4, 5] The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error. *Stockton v. Commonwealth*, 241 Va. 192, 200, 402 S.E.2d 196, 200, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991). In the present case, the trial court had the opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial court. Nothing in the record suggests that the trial court abused its discretion in striking these jurors from the venire for cause despite the attempts of the defense to rehabilitate them.

[6] The trial court found that the other three prospective jurors, Ann Mumaw, Leona Wallace, and Janet Matheson, were adamant in their personal opposition to capital punishment and could not impose a death sentence. Lilly contends that by excluding them from the venire, he was denied the opportunity of having a jury of his peers. Where a juror has clearly indicated that she will be unable to follow the trial court's instructions and consider all the available penalties that might be imposed, it is appropriate for the trial court to excuse the juror for cause. *Gray v. Commonwealth*, 233 Va. 313, 334, 356 S.E.2d 157, 168, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). The elimination of such jurors from the venire "does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community." *Id.* at 335, 356 S.E.2d at 169; *see also Poyner v. Commonwealth*, 229 Va. 401, 413–14, 329 S.E.2d 815, 825 (1985).

[7] Lilly assigns error to the retention of three members of the venire over his motion that they be excused for cause. James Rakes stated during voir dire that he was acquainted with Chief Whitsett and that he might give more credence to Whitsett's testimony as a result. Upon further examination, Rakes stated that he could set aside his acquaintance with Whitsett and consider the testimony of all the witnesses on an equal plane.

[8] Samuel Shumate stated during voir dire that he was a second cousin and "real good friend" of Investigator Ron Hamblin, a prospective witness for the Commonwealth. Shumate testified that his relationship and friendship with Hamblin would not be a factor in considering Hamblin's testimony against that of other witnesses.

[9] Lilly also asserts that an unidentified juror was permitted to remain on the jury panel after having "read a newspaper article about Mr. Lilly's past." Lilly initially objected to the seating of any juror who had been exposed to specific newspaper articles, and this assignment of error apparently relates to a member of the venire who had read one of the articles and was actually seated on the final jury panel. In addressing the issue immediately prior to trial, the trial court

2. The record reflects that the jury was properly instructed on parole ineligibility during the penalty phase of the trial and that Lilly was permitted to argue that his parole ineligible status militated in favor of a life sentence.

reiterated that it accepted the juror's testimony that the article had not prejudiced her.

As noted above, the decision to retain or excuse a juror rests within the sound discretion of the trial court. Here, the trial court had the opportunity to observe these three jurors and evaluate their responses to the questions put to them. Nothing in the record suggests that the refusal to strike these jurors constitutes manifest error by the trial court, and we will not disturb the trial court's exercise of its discretion in these instances. *Stockton, supra.*

[10–12] Lilly further maintains that juror Shumate should have been excused on the ground that Shumate was related to a "party" to the suit.[3] Code § 8.01-358; Rule 3A:14(1). With respect to the application of this rule in criminal cases, we have held that, even though the victim is not a party to the proceeding, a person is disqualified from serving as a juror if he is related to the victim. *Jaques v. Commonwealth*, 51 Va. (10 Gratt.) 690, 695 (1853); *see also Gray v. Commonwealth*, 226 Va. 591, 593–94, 311 S.E.2d 409, 410 (1984).

[13] Lilly asserts that Investigator Hamblin is a "party" to this criminal proceeding. Lilly apparently bases this assertion on the fact that this officer's role in the investigation of the crimes in question was significant to the prosecution's case. Although we have not previously addressed this issue, we hold that when the officer's sole role in a criminal prosecution is as a witness, he is not a "party" within the meaning of Code § 8.01-358 and Rule 3A:14(1). Thus, a juror's relationship to such a police officer-witness does not require *per se* dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly. *See State v. Lee*, 559 So.2d 1310, 1317 (La.1990); *State v. Hunt*, 115 N.J. 330, 558 A.2d 1259, 1267–68 (1989); *Arner v. State*, 872 P.2d 100, 104 (Wyo.1994).

V.

VENUE

[14] After the jury panel was selected, the trial court, which had deferred consideration of the motion, denied Lilly's motion for a change of venue made on the theory that pre-trial publicity had potentially prejudiced the members of the venire. The trial court noted that the selection of the jury panel had not proved difficult, with fewer than half of the jurors stating that they had heard or read about the case, and with none showing particular bias as a result of the pre-trial publicity. Lilly asserts that the trial court erred in not granting the change of venue. We disagree.

[15–17] A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred. *Stockton*, 227 Va. at 137, 314 S.E.2d at 379–80. In order to overcome that presumption, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial. *Id.* Accordingly, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth*, 242 Va. 264, 274, 411 S.E.2d 12, 18 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

[18, 19] The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at 767–68. The trial court should consider "the difficulty encountered in selecting a jury" as a significant factor in determining whether actual prejudice has resulted from the publicity. *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The record here adequately reflects that the trial court acted well within its sound discretion in denying a change of venue in light of the ease with which a qualified jury panel was selected.

3. The Commonwealth asserts that Lilly did not raise this issue below and should be barred from raising it for the first time on appeal. Rule 5:25. However, in noting his objection to the trial court's retention of Shumate, Lilly's counsel stated, "This is a relative and this is a friend." "It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case." *Salina v. Commonwealth*, 217 Va. 92, 93, 225 S.E.2d 199, 200 (1976). The objection noted the family relationship and was sufficiently clear to raise the issue of whether the juror could "stand indifferent to the cause." Code § 8.01-358.

VI.

GUILT PHASE

A. Commonwealth's Use of Photographs and Videotape

[20] During its opening statement, the Commonwealth displayed an enlarged "in life" photograph of the victim to the jury. At the conclusion of that opening statement, Lilly made a motion for a mistrial, asserting that the photograph showing the victim alive was inherently prejudicial because it tended to invoke sympathy for the victim. The trial court found that there was no prejudice to the defendant as a result of the use of the photograph and overruled the motion, but directed that the Commonwealth remove the photograph from further display. Lilly assigns error to the trial court's failure to grant a mistrial.

Lilly cites no authority for the proposition that photographs of the victim taken before his death are inherently prejudicial, an issue not previously addressed in this Commonwealth. Those jurisdictions that have considered the issue have held that there is no inherent prejudice in the use of in life photographs of the victim, especially where the jury will also view crime scene photographs showing the victim. *See, e.g., State v. Broberg*, 342 Md. 544, 677 A.2d 602, 610 (1996). Thus, the use of in life photographs is a matter committed to the discretion of the trial court unless clearly prejudicial. *Id.; State v. Brett*, 126 Wash.2d 136, 892 P.2d 29, 41 (1995); *cf. Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 158 (1978) (in life photographs of victim with his handicapped daughter were prejudicial). We hold that it was within the sound discretion of the trial court to determine that Lilly was not prejudiced by the limited display of the in life photograph of the victim, and we find no abuse of that discretion in this instance.

[21] Lilly assigns error to the admission of certain other photographs and the trial court's denial of his request that black-and-white photographs be substituted for color photographs. These photographs depicted the crime scene of the murder, including graphic images of the victim.

[22, 23] A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime. *Clozza v. Commonwealth*, 228 Va. 124, 135, 321 S.E.2d 273, 280 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. *Williams v. Commonwealth*, 234 Va. 168, 177, 360 S.E.2d 361, 367 (1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The record shows that the trial court reviewed the photographs proffered as potential exhibits by the Commonwealth and excluded the autopsy photographs, which it found excessively graphic. We find no abuse of discretion in the admission of the crime scene photographs, since these accurately depicted the scene of the crime. Similarly, it was within the sound discretion of the trial court to determine whether the probative value of color photographs outweighed the potential prejudice of their content.

[24–26] Lilly also assigns error to the admission of a videotape of the crime scene of the murder. Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime. *Spencer v. Commonwealth*, 238 Va. 295, 312, 384 S.E.2d 785, 796 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990); *Stamper v. Commonwealth*, 220 Va. 260, 270–71, 257 S.E.2d 808, 816 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). If the videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking. *Goins v. Commonwealth*, 251 Va. 442, 459, 470 S.E.2d 114, 126, *cert.*

denied, 519 U.S. ——, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion. *Id.* We find no abuse of discretion in the admission of crime scene videotape here.

B. Admission of Mark Lilly's Statement

[27] At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.

In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."

[28, 29] To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." *Boney v. Commonwealth*, 16 Va.App. 638, 643, 432 S.E.2d 7, 10 (1993); *see also Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).

[30] To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. *Chandler v. Commonwealth*, 249 Va. 270, 278–79, 455 S.E.2d 219, 224–25, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. *Id.*

Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to *Chandler*, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, *Chandler* improperly enlarged the exception to permit the Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that *Chandler* was wrongly decided and should be overturned. We disagree.

We recognize that *Ellison*, *Newberry*, and other cases that applied this hearsay exception prior to *Chandler* involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in *Ellison*, the admission of such statements

> must be left to the sound discretion of the trial court, *to be determined upon the facts and circumstances of each case.* But, in any case, once it is established that a third-party confession has been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of *Hines* [*v. Commonwealth*, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime."

219 Va. at 408–09, 247 S.E.2d at 688 (emphasis added).

[31] Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

[32] Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree.

[33] The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219–20, 27 L.Ed.2d 213 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process.' " . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.

White v. Illinois, 502 U.S. 346, 356–57, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence.[4] *See Randolph v. Commonwealth*, 24 Va.App. 345, 353, 482 S.E.2d 101, 105 (1997); *Raia v. Commonwealth*, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996).

[34] Lilly further asserts that the Commonwealth was permitted to play tape recordings of Mark Lilly's statements to the jury, whereas it had only supplied Lilly with transcripts of those statements in response to Lilly's discovery request. The record reflects that the trial court offered defense counsel the opportunity to review the recordings before they were played to the jury. Assuming, without deciding, that the discovery motion and subsequent order of the trial court required disclosure of duplicate tapes rather than transcripts, we hold that Lilly was not prejudiced by the failure of the Commonwealth to do so. Having been supplied with accurate transcripts of the tape recordings prior to trial and having had an adequate opportunity to review them before they were played to the jury, there is no reasonable probability that the proceeding would have been different had duplicates of the tapes been provided to Lilly prior to trial. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383–84, 87 L.Ed.2d 481 (1985); *Robinson v. Commonwealth*, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986); *Briley*

4. Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

v. Commonwealth, 221 Va. 563, 576, 273 S.E.2d 57, 65 (1980).

C. Admission of Lilly's Statement to Chief Whitsett

[35] Lilly assigns error to the admission of Chief Whitsett's testimony that Lilly said "me" when Whitsett asked Lilly "what does a murderer look like anyway?" Lilly asserts that Whitsett's conversation with him constituted a custodial interrogation prior to Lilly's having been informed of his right to counsel and his right against self-incrimination.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.... Volunteered statements of any kind are not barred by the Fifth Amendment." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). Lilly's statement was clearly not the result of a custodial interrogation in that he initiated the conversation and the statement was voluntary. We hold, therefore, that the trial court did not err in permitting this statement into evidence. *Massie v. Commonwealth*, 211 Va. 429, 431–32, 177 S.E.2d 615, 617 (1970).

[36] Lilly further asserts that Whitsett's testimony was unreliable since in preliminary testimony Whitsett testified only that he "thought" Lilly had said "me." Whitsett testified at trial that he was certain of what Lilly said. Lilly was not prohibited from cross-examining Whitsett concerning his certainty as to the statement. Thus, it was a matter for the jury to weigh and determine. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982).

D. Miscellaneous Evidentiary Rulings

[37] Over Lilly's objection, Lieutenant Gary Price of the Giles County Sheriff's Office was permitted to testify that Lilly declined to submit to a gunpowder residue test and then began rubbing his hands together. Price testified that since he believed a gunpowder residue test constituted a search requiring a warrant or the consent of the suspect, he had informed Lilly that the test was voluntary. Price further testified that Lilly's rubbing his hands together would get rid of gunpowder residue.

Lilly concedes that he could have been required to take the test. However, Lilly contends that, because he was told that the test was "voluntary," the evidence of his refusal amounts to a use of a defendant's silence as an admission of guilt.

[38] We will assume, without deciding, that evidence of a defendant's refusal to submit to a gunpowder residue test after having been informed, erroneously, that the test was voluntary, is inadmissible as a violation of the Fifth Amendment right against self-incrimination.[5] Under the circumstances of this case, however, that error was harmless beyond a reasonable doubt. The record shows that Lilly fired one or more of the guns taken in the breaking and entering prior to the murder. Thus, the gunpowder residue test would have been positive for that reason alone, and the jury was aware of that circumstance. In addition, we hold that Lilly's act of rubbing his hands together in an apparent attempt to destroy any gunpowder residue on his hands was a nonverbal act that went beyond the mere refusal to submit to the test and, as such, was not subject to exclusion under the right against self-incrimination. *Accord Salster v. State*, 487 So.2d 1020, 1021 (Ala.Crim.App.1986) (defendant's nonverbal conduct in secreting contraband was not constitutionally protected); *see also Stevenson v. Commonwealth*, 218 Va. 462, 465, 237 S.E.2d 779, 781 (1977)(nonverbal conduct may be treated as an assertion).

[39] Lilly also assigns error to the admission of evidence that dried blood was found on the back of his pant leg. Lilly contends that the location of the bloodstain was inconsistent with its having resulted from the murder because the Commonwealth alleged Lilly was facing the victim at the time Lilly shot the victim. Lilly further asserts that no test was conducted to determine whether the blood was of human origin, and that it is as likely that this blood came from the geese that the men shot earlier in the day. Therefore, he asserts that the trial court abused its discretion in admitting this evidence. We disagree.

The presence of bloodstains on Lilly's clothing was probative, however slightly, of his involvement in the murder. The lack of a scientific determination that the blood was from a human source was a matter of the weight and credibility, if any, of that evidence for the jury to consider. The record does not show that Lilly was prohibited from questioning the Commonwealth's witnesses on this matter. Accordingly, we hold that admission of this evidence was not error.

[40] Lilly objected to the introduction of the medical examiner's report on the ground that it contained references to tests not performed by the proponent of the report. The Commonwealth responds that the trial court excluded from evidence a local medical examiner's report, admitting only the report prepared by the proponent or his staff. To the extent, if any, that the contents of the report admitted fell outside the exception to the hearsay rule provided for medical examiners' reports under Code § 19.2-188, we hold that Lilly has failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence, and that in light of the other proof in the record, its admission was harmless beyond a reasonable doubt. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 807 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983).

[41] Lilly assigns error to the trial court's refusal to admit a statement made by Barker to a friend to the effect that Barker would be able to kill his best friend and feel no remorse. The record reflects, however, that Lilly initially objected to the statement's admission, then later sought its admission over the Commonwealth's objection. After the Commonwealth subsequently withdrew its objection, the trial court reversed its ruling to exclude the statement, but Lilly failed to recall the witness. Accordingly, we hold that this issue was not properly preserved for review.

E. Witness Sequestration Issue

[42] Barker, who had not been present when the trial court admonished the other witnesses to refrain from reading or observing media reports about the trial, testified that he had read a newspaper article the morning before he testified. The trial court reviewed the article and questioned Barker, who testified that nothing in the article affected his testimony. Lilly assigns error to the trial court's refusal to strike Barker's testimony.

[43] Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court. *Hampton v. Commonwealth*, 190 Va. 531, 553–54, 58 S.E.2d 288, 297 (1950). We cannot say that the trial court abused its discretion in refusing to strike the evidence of a witness who was not aware of the sequestration order and testified that the exposure to the newspaper article did not affect his testimony.

F. Jury Instruction Issue

[44, 45] Lilly assigns error to the trial court's refusal to grant his proposed instruction on voluntary intoxication. The facts, however, did not warrant the proposed instruction.

> Generally, voluntary intoxication is not an excuse for any crime. The only exception to this general rule is in cases involving deliberate and premeditated murder. Mere intoxication will not negate premeditation. However, when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing.

Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988) (citations omitted).

Here, Lilly was able to operate an automobile both before and after the murder. During his flight immediately after the murder, he committed robberies to facilitate his continued flight and took steps to deliberately

5. See *Herring v. State*, 501 So.2d 19, 21 (Fla.Ct.App.1986) (informing defendant that gunpowder residue test is voluntary permits defendant to refuse test). *But see Wilson v. State*, 596 So.2d 775, 777–78 (Fla.Ct.App.1992) (criticizing and distinguishing *Herring*); *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, 355 (1981) (permitting evidence that defendant refused to submit to gunpowder residue test without attorney present).

conceal his involvement in the murder. All of these actions suggest that he was fully in command of his faculties and acted with deliberation. Nothing in the evidence suggests that he was so intoxicated as to be unable to form the requisite intent to commit premeditated murder. Accordingly, the trial court properly refused the proffered instruction on voluntary intoxication.

G. Prosecutorial Misconduct

Lilly assigns error to the trial court's refusal to grant a mistrial after the Commonwealth's Attorney allegedly pointed the murder weapon at Lilly and his counsel during closing argument. After making a cursory statement that the action of the prosecutor was prejudicial, Lilly addresses the remainder of his argument to the trial court's statement, "[T]hat's ridiculous. [The gun is] not pointed at you . . . nor is it pointed at anyone in this Courtroom," contending that it was an intentional disparagement of Lilly's counsel. This argument was not raised below, and may not be raised for the first time on appeal. Rule 5:25.

VII.

PENALTY PHASE ISSUES

[46, 47] Lilly assigns error to the trial court's refusal to grant a penalty phase instruction directing the jury to consider "residual doubt" of guilt in considering the sentence. We have previously held that such an instruction is inappropriate. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207. Lilly also sought an instruction directing the jury to "impose the lower grade" of punishment if there was a reasonable doubt as to the grade of punishment to be imposed. The trial court properly ruled that this instruction was both confusing and redundant of an instruction already accepted by the trial court which directed the jury that the Commonwealth was required to present evidence beyond a reasonable doubt of the existence of one or both of the aggravating factors necessary for imposition of the death penalty.

VIII.

SENTENCE REVIEW

Under Code § 17-110.1(C)(1) and (2), we are required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Lilly makes no particularized argument that passion, prejudice, or any other arbitrary factor influenced the jury's decision, and we find nothing in the record that would support such a finding.

[48] In conducting our proportionality review, we must determine "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). We have examined the records of all capital murder cases reviewed by this Court, including those cases in which a life sentence was imposed. We have given particular attention to those cases in which, as here, the death penalty was based on both the "future dangerousness" and the "vileness" predicates.

Based on this review, we conclude that Lilly's death sentence is not excessive or disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes. *See, e.g., Gray*, 233 Va. at 354, 356 S.E.2d at 180; *Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294, *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

IX.

CONCLUSION

We find no reversible error in the judgment of the trial court. Having reviewed Lilly's death sentence pursuant to Code § 17-110.1, we decline to commute the sentence of death. Accordingly, we will affirm the trial court's judgment.

Affirmed.

Chauncey Jacob JACKSON

v.

COMMONWEALTH of Virginia.

Record Nos. 971720, 971721.

Supreme Court of Virginia.

April 17, 1998.

Following transfer from the Norfolk Juvenile and Domestic Relations District Court to stand trial as adult, defendant was convicted in the Circuit Court, City of Norfolk, Lydia Calvert Taylor, J., of capital murder and five other related felonies, all of which were committed when he was 16 years old. Automatic review of his death sentence was consolidated with appeal of right from his capital murder conviction, and his appeal from remaining convictions was certified from the Court of Appeals, and consolidated with capital murder appeal. The Supreme Court, Whiting, Senior Justice, held that: (1) defendant's statements to police were product of his free will, made after knowing, voluntary, and intelligent waiver of his *Miranda* rights; (2) trial court properly declined to strike three prospective jurors for cause; (3) nine-month delay in circuit court's review of transfer order was procedural error, but did not deny defendant due process; (4) defendant's speedy trial rights were not violated; (5) Commonwealth was properly permitted to reopen its case after resting; (6) evidence was sufficient to corroborate defendant's confession; (7) imposition of death penalty upon 16-year-old juvenile is not cruel and unusual punishment; (8) no error arose from testimony of court-appointed psychologist; and (9) death penalty was not excessive and disproportionate punishment.

Affirmed.

Hassell, J., issued opinion concurring in part and dissenting in part.

1. Criminal Law ⇐1213.8(8)

The death penalty does not constitute cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐1208.1(5)

Imposition of the death penalty based on "future dangerousness" is not unconstitutional on the ground that the use of a prior unadjudicated factor is permitted without any requirement that the conduct be established by any standard of proof.

3. Homicide ⇐311, 351

The statute and the court's instructions in conformity thereto which permit imposition of the death penalty based on "future dangerousness" are not unconstitutional on the ground that they are "incomplete and vague" and do not provide "meaning and guidance." Code 1950, § 19.2-264.

4. Double Jeopardy ⇐30

Allowing introduction of evidence of capital murder defendant's convictions for other crimes in sentencing phase to establish future dangerousness did not violate double jeopardy clause of Fifth Amendment. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐1134(2)

The Supreme Court's method of reviewing the proportionality of a death sentence by considering the records only of those murder cases in which sentences of death were imposed and not of those murder cases in which lesser sentences were imposed is valid.

6. Criminal Law ⇐1115(1)

Capital murder defendant failed to show that trial court did not "order appropriate relief" when it failed to require Commonwealth to produce "exculpatory statements, evidence or admissions," and to ensure that no such evidence existed, or that it be provided to defendant, where he did not state in what respects court failed to provide such

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THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on Brady I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 5th day of June, 1998.

Benjamin Lee Lilly, Appellant,

against Record Nos. 972385 and 972386
Circuit Court No. 13636

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 17th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amendment 6.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amendment 14, § 1.

IN VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA Plaintiff	)	
v	)	Motion In Limine
BENJAMIN LILLY Defendant	)	

Comes Now the Defendant, Benjamin Lilly, by and through counsel, pursuant to the 6th, 8th, and 14th Amendments of the Constitution of the United States, and asks this Court for an order precluding the admission of the statements of Mark Lilly that were given to Investigator Gary Price of the Giles County Sheriff's office, should Mark Lilly be unavailable to testify, based on the following grounds;

1) Admission of said statements would violate the Defendant's sixth amendment, through the fourteenth amendment, right to cross-examine one of the alleged accomplishes about a purported confession. DOUGLAS v ALABAMA, 380 U.S. 415, 1964, BRUTON v UNITED STATES, 391 U.S. 123, 1968, CRUZ v NEW YORK, 481 U.S. 186, 1986.

2) Admission of said statement would violate the Defendant's 6th 8th and 14th amendment rights because the statements that Mark Lilly gave would not conform to any hearsay exception, namely against his penal interest, because they are not reliable due to

Circuit Court of Montgomery County
21 DAY OF October 1996
At 9:00 A.M. O'CLOCK A.M.
ELLAN C. BURKE, CLERK

A. Thank you.

THE COURT: If you'll go with Mrs. Skidmore.

THE COURT: Your next witness, Mr. Schwab.

MR. SCHWAB: Your Honor, before we call our next witness, the Court has to rule on some prior motions.

THE COURT: All right, sir.

MR. SCHWAB: And I believe it would be a good time for the jury to take another break.

THE COURT: All right, sir. Mrs. Skidmore, lets adjourn for about twenty minutes.

BAILIFF WEAVER: Court is in recess for twenty minutes.

THE COURT: Before the Court is the defendant's motion in limine concerning statements made by Mark Lilly to certain investigators outside the presence of the defendant. If you want to restate your motion for the record, it has been filed I understand, but if you want to restate your motion for the record, as

well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and

Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is

another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if

the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say

is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record Douglas v. Alabama, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. Brutan v. United States -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe Crews v. New York. I also believe I had submitted to the Court two other cases. That was an Idaho v. Wright and just to

briefly discuss Idaho v. Wright, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned

specifically in the Idaho v. Wright that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the Idaho case because the Idaho case involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is

that the whole statement can come in. The Court has seen in the Scaggs case and the Chandler case which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U. S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the

confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against

self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the

points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving

statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: . Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Appellant received the death penalty in this Capital Murder case. He and two others, including his brother Mark Lilly, were charged with several crimes. The Appellant was charged with being the trigger man in the robbery and murder of Alexander DeFillipis.

Appellant's brother, Mark Lilly, who was brought in as a witness without being given immunity, refused to testify, asserting his 5th Amendment right. His statements to police would later be read to the jury. Moreover, Mark Lilly would later admit under oath that he had lied to police.

At trial, certain objections and exceptions were made by the defendant. The defendant alleged error from the selection of certain jurors; error in the display by the Commonwealth at counsel table a photograph of the victim in life; error by the Commonwealth's Attorney in his closing argument by pointing the murder weapon toward defense counsel and Appellant; the admission of two hearsay statements of Appellant's brother after the assertion of the brother's 5th Amendment rights.

The two statements made by Appellant's brother contained much more than a declaration against the interest of the brother. The statements introduced and approved by the Court contained statements by police officers that they in effect did not believe that Mark Lilly had killed DeFillipis, but that they believed in fact that Appellant was guilty of the murder. Obviously, this is an opinion as to the innocence or guilt of Appellant, Benjamin

Lee Lilly, and is not admissible.

STATEMENT OF FACTS

At the start of this trial, the Commonwealth displayed in full view of the jury a framed portrait of the victim in life. After the Court ruled that the Commonwealth should not have placed the photograph, a motion for mistrial was denied.

The evidence most favorable to the Commonwealth indicates that the Appellant, his brother Mark Lilly, and Gary Barker burglarized a home in Floyd County, Virginia and thereafter travelled to Radford, Virginia to the home of a friend, where personal property taken from the burglary was divided. All three men were drinking heavily. The Court would refuse an instruction on voluntary intoxication.

After travelling to several places within Montgomery County, Virginia, the automobile in which the three were travelling became disabled near a convenience store, Hethwood Express, in Blacksburg, Virginia.

The murder victim, Alexander DeFillipis, had driven a friend to the convenience store. The evidence indicates that while DeFillipis' friend was inside the store, the Appellant carjacked the vehicle and, along with Mark Lilly and Barker, took Alexander DeFillipis with them to a secluded spot in Montgomery County, Virginia where the three forced DeFillipis to disrobe. Shortly thereafter, DeFillipis was shot three times in the head, killing him instantly.

The three travelled from the scene of the murder to

Eggleston, Virginia and Pembroke, Virginia, where they robbed two stores. The three were apprehended after the robberies; Barker and Mark Lilly unsuccessfully attempted to flee from police.

A portion of the Commonwealth's evidence consisted of blood found on the back of Appellant's pants leg, which could not be determined to be of human origin. Appellant objected to the admission of a statement allegedly made by Appellant to Chief Whitset.

Appellant objected also to evidence being introduced regarding his refusal to participate in a paraffin test after he had been advised erroneously by investigating officers that participation was voluntary.

Objection was also made to the admittance of the medical report as evidence on the grounds that it was hearsay and that the medical examiner appeared in court and had testified to the jury concerning items in the report.

Objection was also made to one of the Commonwealth's chief witnesses, co-defendant Gary Barker, having read prior newspaper articles that the Court ordered witnesses not to read. (Barker was not present when this admonishment was given.)

The main evidence linking the Appellant to the crimes was co-defendant Gary Barker and two taped statements of co-defendant Mark Lilly, Appellant's brother. The Court ruled that Mark Lilly's assertion of his 5th Amendment rights resulted in his being unavailable. Objection was made to the taped statements in which Mark Lilly told an investigator, "we had nothing to do with

the shooting." He further stated that "we" meant Mark Lilly and Gary Barker. The statement of Mark Lilly contained statements of the police (giving opinions of defendant's guilt), and statements that Mark Lilly and Barker thought the Appellant was going to let DeFillipis go. The statement of Mark Lilly named Appellant as the trigger man, placing Appellant as the person facing the death penalty.

The Court also refused to give an instruction on voluntary intoxication and an instruction stating that if the jury had a reasonable doubt as to punishment (life or death), they had to impose the lower grade of life imprisonment.

Gary Barker's testimony also implicated Appellant as the trigger man.

During closing arguments, the Commonwealth's Attorney pointed the murder weapon in the direction of defense counsel and Appellant. A mistrial was requested, but again refused.

IN THE SUPREME COURT OF VIRGINIA

BENJAMIN LEE LILLY,
Appellant

v

Record No. 972386

COMMONWEALTH OF VIRGINIA,
Appellee

AMENDED ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

Now comes the Appellant and pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia and assigns as error the following:

ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 118-153.

2. The trial court erred when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 330.

3. The trial court erred when it refused to seat Kristine Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Pages 390-418.

4. The trial court erred when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Page 501-526.

5. The trial court erred when it sat James Rakes as a juror when he indicated he would believe Chief Whitsett more than other witness because he knew Chief Whitsett, in violation of the Defendant's rights as guaranteed by the fifth, sixth,

and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 576-605.

6. The trial court erred when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 606-626.

7. The trial court erred when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution. Transcript Volume 2A, Pages 645-656.

8. The trial court erred when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2B, Pages 936-952.

9. The trial court erred when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution. Transcript Volume 2B, Page 957-964.

10. The trial court erred when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 212-215, Transcript Volume 2, Page 198, and Transcript Volume 2B, Pages 783-784 and 1011-1013.

11. The trial court erred when it refused to allow the defense to educate the jury during voir dire in regard to the option life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 138-140 and 273-274.

12. The trial court erred when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States

Constitution. Transcript Volume 1, Pages 207-209.

13. The trial court erred when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 220-222.

14. The trial court erred when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 220-232. Transcript Volume 5 pages 1394-1395.

15. The trial court erred when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 240-264 and Transcript Volume 1, Page 14-18, 249, 250, 251, 252.

16. The trial court erred by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 17-18.

17. The trial court erred in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23 and Transcript Volume 4, Pages 773-777, statement made between pages 813-814, 847-848 and 866-867, Transcript Volume 5 pages 1303, 1587-1598, 1610-1620 and 1652-1653.

18. The trial court erred when it determined that a co-defendant's statement met the criteria set forth in Chandler v Commonwealth, 249 Va 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23; Transcript Volume 4, Pages 773-790, 847-848, and 866-867; Transcript

Volume 5, Pages 1303, 1587-1598, 1610-1620, and 1652-1653.

19. The trial court erred when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 54-56 and 93-94.

20. The trial court erred in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 302.

21. The trial court erred when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 545-546, and 561.

22. The trial court erred in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 551-560, and 577.

23. The trial court erred when it refused to declare a mistrial after a co-defendant, (Barker) read an article on the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 29-40, 674-675.

24. The trial court erred when it allowed a police officer (Officer Whitsett) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 149-185, 268-273. Transcript Volume 4, Pages 758, 864. Transcript Volume 5, Pages 1541-1542.

25. The trial court erred when it allowed statements allegedly made by the Defendant to Chief Whitsett when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and

fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 154-185, 268-273.

26. The trial court erred when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 888-892, 904.

27. The trial court erred when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1193-1196.

28. The trial court erred when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1279-1292, 1310-1311, and 1317-1321.

29. The trial court erred at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1486.

30. The trial court erred when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1492-1493.

31. The trial court erred when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1498.

32. The trial court erred when they allowed the Commonwealth to

introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 282.

33. The trial court erred when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 266-268.

34. The trial court erred when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 789-793, and 811.

QUESTIONS PRESENTED AND ARGUMENT IN SUPPORT

1. Did the trial court err when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.510-545)

2. Did the trial court err when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A. 716-722)

3. Did the trial court err when it refused to seat Kristina Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A 782-812)

7. Did the trial court err when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution? (A.1039-1050)

8. Did the trial court err when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1335-1351)

9. Did the trial court err when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution? (A.1356-1363)

During the voir dire process the trial court struck several jurors for cause when they indicated opposition to the death penalty. The trial court, especially in the cases of Ms. Huffman, Ms. Mitchell and Ms. Jones, abused its discretion and struck the jurors for cause.

Beginning with Connie Huffman, the trial court struck for cause because of a concern about the juror's ability to apply the

death penalty. Ms. Huffman stated to the trial court that she could impose a death penalty and that she would follow the trial court's instruction and follow the law. During her entire questioning by the trial court and counsel regarding her ability to perform her duty, Ms. Huffman stated that while she didn't believe in the death penalty, if she had to be on the case "I would be fair in what my decision would be." (A.514) Moreover, when asked by the trial court if her belief or opinion would impair her from imposing the death penalty, Ms. Huffman stated that "I don't think that would be any problem." Ibid.

In regard to Janet Matheson, Appellant concedes that Ms. Matheson did express an inability to impose the death penalty due to her beliefs, however the Appellant maintains that he is entitled to a jury of his peers and that by striking Ms. Matheson the trial court denied the defendant that right.

The third juror struck was Kristina Mitchell. Ms. Mitchell stated to the trial court that she was struggling with her own beliefs regarding the death penalty, however she indicated that she could follow the law and impose the death penalty.(A.786) Over the entire questioning Ms. Mitchell agreed to follow the trial court's instruction which included possible imposition of the death penalty. Specifically, when asked by the trial court whether her beliefs would impair her responsibility, Ms. Mitchell stated "No," that they would not effect her responsibility. (A.810)

Regarding Ms. Wallace the Appellant concedes that Ms.

Wallace expressed a reluctance to set aside her beliefs, but she indicated that she would be able to follow the law.

Ms. Jones indicated that she had spoken to her minister and felt that she could serve as juror. (A.1340) She did indicate it would be difficult to sit in judgement of another person and sentence someone to death, but would the trial court desire someone who took that duty lightly? When viewing the entire voir dire it is clear that Ms. Jones understood her duty as a juror and was capable of carrying it out.

The Appellant concedes that Ms. Mumaw expressed an opinion that she could not impose the death penalty. However, the Appellant argues that he is entitled to a jury of his peers and that by excluding Ms. Mumaw the trial court denied the defendant that right as provided by the U.S. constitution.

In determining whether the trial court abused its discretion this Court has stated that several factors must be considered on appellate review. First, the juror's views would have to substantially impair or prevent their performance of their duties as a juror; second, the trial court's decision will not be disturbed unless there is manifest error because the trial court is in a position to view and hear the juror; and third, that this Court will review the entire voir dire, not a single question. Barnabei v Commonwealth, 252 Va. 161, 173, 477 S.E.2d 270 (1996).

When applying the law to the matter at hand the Appellant maintains that trial court abused its discretion, especially when examining Ms. Huffman, Ms. Mitchell and Ms. Jones. The Appellant

maintains such abuse in discretion rose to the point of being a manifest error. Ms. Huffman on several occasions maintained that she could be fair and set aside her own beliefs and apply the law. However, the trial court ignored Ms. Huffman's responses and focused in on her belief about the death penalty. The law requires that the belief must substantially affect the juror's ability to perform their duty, but Ms. Huffman maintained throughout her voir dire that she could fulfill that duty. Ms. Jones made the same commitment to serve responsibly as a juror.

4. **Did the trial court err when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.916-920)**

The Appellant maintains that when the trial court banned the defense from deviating from the approved list of questions, it deprived the Appellant from asking relevant questions of the potential jurors as allowed for by Buchanan v Commonwealth, 238 Va. 389, 384 S.E.2d 757, (1989). Thereby the trial court abused its discretion and violated Virginia code §8.01-358.

5. **Did the trial court err when it sat James Rakes as a juror when he indicated he would believe Chief Whitset more than other witness because he knew Chief Whitset, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.970-999)**

6. **Did the trial court err when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1000-1020)**

On two occasions the trial court failed to strike jurors for cause when it was clear that neither James Rakes nor Samuel Shumate were impartial as required by the United States Constitution, the sixth and eighth through the fourteenth Amendments.

On Page A.988 of the Joint Appendix Mr. Rakes gives a clear and honest answer that he would believe Chief Whitset more than other witnesses because of their relationship. In addition, when asked whether he would give Whitset more credibility than other witnesses Rakes states "(i)t's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do." (A.988) When the trial court questioned Rakes about his ability to view all witnesses with the same weight, Rakes responded "No, your Honor, I think what I meant to say was I'd probably start off at a different point because you do have some familiarity, some knowledge and some past about that person, maybe you would start with a different feeling when you first began, but I don't know that would carry on through all the testimony." (A.997) Clearly, by all of Rakes' statements he felt that he would give Whitset more credibility at the start of his testimony then other witnesses. Whitset was also an important witness in the case because of alleged statements that Lilly may have given to him. Whitset's creditability was brought directly into question as to what he believed he heard Lilly say. The trial court was aware of Whitset's importance, because the trial court had heard a motion to suppress the

statement months before. Defense counsel was forced to use one its preemptory challenges to strike Rakes.

In Mr. Shumate's case, Shumate testified that he was related to Investigator Hamlin and that Shumate consider Hamlin to be a "real good friend." (A.1016) Moreover, the defense informed the trial court that they intended to call Hamlin and criticize some of his work on this case. Defense counsel did just as it had proffered and attacked the manner in which Hamlin had handled pieces of evidence. Hamlin was also one the investigators who questioned Mark Lilly.

In objecting to Rakes and Shumate, defense counsel cited Breeden v Commonwealth, 217 Va. 297, 227 S.E.2d 734 (1976), which holds that a defendant has a constitutional right to a fair and impartial jury and that all that is needed to strike a juror is reasonable doubt. (See also Wright v. Commonwealth, 73 Va. (32 Gratt.) 941 (1879). In applying the law to the matter at hand it becomes clear that reasonable doubt was present regarding both Rakes' and Shumate's impartiality due to their relationships to prospective witnesses, thereby violating Appellant's constitutional rights to a fair and impartial jury.

10. **Did the trial court err when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.305-308, 590-591, 1181-1182, 1410-1412)**

The defense filed several affidavits to show that there was community prejudice towards the Lilly. Radio, television and newspaper articles recite inflammatory, hostile and prejudicial

accounts of Lilly and the crime for which he was charged. These reports also included conclusory labels about Lilly which were prejudicial in nature, such as the Roanoke Times editorial calling Lilly a "thug" and asking why the he wasn't incarcerated. In addition the newspapers reported sympathetic information about the victim. In a Virginia capital case the trier of fact cannot receive a victim impact statement before the sentencing phase of the trial which describes the victim and the effect his death had on his survivors as well as the Community.

Moreover, the publication of Lilly's prior record was highly prejudicial. Numerous articles referred to Lilly's prior criminal record. Such publication created an opportunity for the jury's verdict to rest on impermissible grounds. The widespread publicity concerning the nature of the alleged offenses and Lilly's alleged involvement presented a reasonable likelihood that Lilly would be denied his constitutional right to a fair trial and impartial jury. Therefore a change of venue under Va. Code Ann. §19.2-251 was necessary to protect Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

11. Did the trial court err when it refused to allow the defense to educate the jury during voir dire in regard to the option of life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.231-233, 366-367)

On two separate occasions, defense attempted to educate the jurors before the sentencing phase in regard to the fact that

parole has been abolished for those in Virginia who are convicted under the capital murder statute. Specifically, counsel proffered the following question to the trial court; "Would you be more likely to objectively consider life in prison if you knew that a sentence of life in prison means that the person would not ever become eligible for parole?"

Appellant maintains that by refusal to allow defense counsel to educate the jury during voir dire prohibited him from obtaining a fair and impartial jury. The United States Supreme Court held in Simmons v. South Carolina, 114 S.Ct. 2187 (1994) that the defendant had a right to educate the jurors that life in prison meant life in prison. However, in order to properly voir dire the jurors, the Appellant needed the ability to inform the potential jurors that if convicted Lilly would not be released until his death. Appellant maintains that this was a violation of his rights as guaranteed by the fifth and sixth through the fourteenth Amendments of the United States Constitution.

12. Did the trial court err when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.300-302)

31. Did the trial court err when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2982-2983)

In order to ensure effective assistance of counsel as

guaranteed by the Sixth Amendment to the Constitution of the United States, Appellant in this case attempted to determine the appropriateness of a motion to dismiss the capital indictment upon which this prosecution was based were unconstitutional as applied in this action.

Appellant argued that the statute may be unconstitutional as applied in this case because, inter alia, (1) the evidence for the Commonwealth may, as a matter of law, have been obtained unconstitutionally or be insufficient to establish the elements of capital murder, or (2) the Commonwealth may seek to apply one or more of the aggravation factors necessary to render defendant eligible for a sentence of death in an unconstitutional manner or the evidence may, as a matter of law, be insufficient to support a sentence of death.

Notice and opportunity to be heard are the cornerstones of due process of law. Lankford v Idaho, 500 U.S. 110, 127 (1991); Goss v Lopez, 419 U.S. 565, 579 (1975). Further, due process requires that a defendant be given notice and opportunity to defend against the Commonwealth's case for death. Simmons v South Carolina, 114 S.Ct. 2187 (1994); Lankford v Idaho, 500 U.S. 110 (1991); Gardner v Florida, 430 U.S. 349 (1977). In addition, the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages. Lockett v Ohio, 438 U.S. 586, 604 (1976). The Virginia Supreme Court has held that the indictment gives notice of the offense. Beard v Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994); Mickens v Commonwealth, 247

Va. 395, 442 S.E.2d 678 (1994). The indictment, however, gives no notice of aggravating factors, including the constitutionally required narrowing construction if the government will rely on the "vileness" factor.

Appellant, in demanding that the Commonwealth identify its evidence, did not seek discovery. Copies of statements of the Commonwealth's witnesses and scientific evidence, for example, were not sought in the motion for the Bill of Particulars. Rather, Appellant sought and was entitled to have the Commonwealth identify its evidence so that proper pretrial challenges to the application of Virginia's capital murder statute in this case could have been made where appropriate. The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the law of Virginia both authorize that the bill of particulars be granted when challenging the constitutionality of a statute.

Va. Code Ann. §19.2-266.2 requires the defense to raise a motion to dismiss an indictment or any count thereof, on the ground that a statute upon which it is based is unconstitutional, by written motion or objection prior to trial, which is what counsel did in this matter. Additionally, defense motions for suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Constitution of the United States or the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination must be raised by written motion or objection prior

to trial.

The statute further requires that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230." The appellant requested a bill of particulars in order to move for dismissal of the capital indictment or to prohibit imposition of the death penalty on the grounds that Va. Code Ann. §18.2-231 and Va. Code Ann. §19.2-264 were unconstitutional as applied in this case. However the trial court denied Appellant's motion.

A motion to dismiss an indictment on the grounds that the underlying statute is unconstitutional on its face requires no such information; for example, a bill of particulars is not sought in aid of defendant's motion to prohibit imposition of the death penalty alleging systemic deficiencies in Virginia death penalty statutes. The indictment and the underlying statute are sufficient grounds to make this motion.

The Appellant argued in contrast, Va. Code Ann. §19.2-266-2 requires the Commonwealth to provide such in order for the defense to make a timely motion to dismiss the capital indictment on the grounds that the underlying statutes are unconstitutional as applied to this defendant, in that the time, place, manner, and means of the crime are constitutionally insufficient and cannot support either the capital indictment or the imposition of the death penalty.

The motion for a bill of particulars requests identification of all evidence upon which the Commonwealth intends to rely in seeking a capital murder conviction or imposition of the death penalty. Such identification is essential to enable the defendant to determine whether to move for suppression of the evidence on the grounds that it was obtained in contravention of the constitution.

The Supreme Court of Virginia has held that "[t]here is no general right to discovery in a criminal case, even where a capital offense is charged." Strickler v Commonwealth, 241 Va. 482, 490, 404 S.E.2d 227, 233 (1991). However, recognizing that the line between general discovery and a bill of particulars is difficult to draw, the General Assembly has determined that because notice of evidence to support a defendant's pre-trial motions under §19.2-266.2 is compelled by the Sixth, Eighth and Fourteenth Amendments, the trial court is required by that statute to direct the Commonwealth to file a bill of particulars upon motion of the defendant.

It has been repeatedly held by the Virginia Supreme Court that it is the duty of the trial court to compel the attorney for the Commonwealth, when demanded by the accused, to file such bill of particulars as will apprise the defendant of the cause and nature of his accusation. Riner v Commonwealth, 145 Va. 901, 134 S.E. 542 (1926). In a capital case, the cause and nature of the allegation include those factors the Commonwealth must prove in order to render a defendant eligible for a sentence of death. The

United States Supreme Court also has noted that, in order for the requirements of due process to be met and for the adversarial system to work properly, counsel must be given "a meaningful opportunity to present a complete defense," Crane v Kentucky, 476 U.S. 683, 690 (1986), and that a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v Florida, 430 U.S. 349, 362 (1977). This requires notice of all such facts that will influence the sentencing decision. Simmons v South Carolina, 114 S.Ct. 2187 (1994) (due process requires that a defendant be permitted to rebut the future dangerousness aggravating factor with evidence of parole ineligibility if sentenced to life in prison); Lankford v Idaho, 500 U.S. 110, 126 (1991) (lack of notice that the death sentence may be imposed by the trial judge, even though the prosecutor was not requesting the death penalty, created an "impermissible risk" that the adversarial system would not function properly).

In Virginia, the Commonwealth must prove one of two aggravating factors to support the death penalty. The jury may impose a death sentence only if it finds that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery (the "vileness" factor), or that the defendant would commit criminal acts of violence in the future that would constitute a continuing serious threat to society (the "future dangerousness" factor). Va. Code Ann. §19.2-

264.4 (1990).

The Virginia "vileness factor" requires narrowing constructions to further distinguish its application because it uses broad, vague terms that could apply to any murder. Maynard v Cartwright, 486 U.S. 356 (1988). The narrowing construction becomes, in effect, a limitation and clarification of the offense charged. The Supreme Court has flatly held that the language used in Georgia's "vileness" factor was constitutionally deficient.

Similarly, Virginia's "future dangerousness" aggravating factor is comprised of broad, vague terms that could apply to any murder. Maynard, supra. No limitation nor clarification of the overly broad offense described is provided to sentencers. Therefore, a constitutionally sufficient narrowing construction of the "future dangerousness" aggravator is also required. Ibid.

Furthermore, not all narrowing constructions are sufficient to meet constitutional requirements. Shell v Mississippi, 498 U.S. 1 (1990).

The appellant maintains Va. Code Ann. §19.2-266.2 required the trial court to order the Commonwealth to file a bill of particulars for this defendant. Further, for a capital defendant to have constitutionally adequate notice and opportunity to defend himself, it was essential that the Commonwealth provide the Appellant with both the aggravating factors and the narrowing constructions thereof upon which the Commonwealth intends to seek the death penalty. Finally, Va. Code Ann. §19.2-230 permits the trial court judge to order the Commonwealth to file a bill of

particulars at his discretion; by failing to order a bill of particulars the trial court abused its discretion.

13. Did the trial court err when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-315)

14. Did the trial court err when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-328, 2878-2879)

20. Did the trial court err in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1741)

22. Did the trial court err in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1990-1999, 2016)

32. Did the trial court err when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.375)

On several occasions the trial court admitted evidence that was more prejudicial than probative.

During pretrial motions, Appellant moved to exclude color photographs and videotape of the victim after the murder. While some of the photographs may have been necessary to prove elements of the crime, the prejudicial effect would have been diminished if the trial court had required the Commonwealth to introduce

black and white photographs. Lilly argues that the trial court, in failing to require black and white photographs and videotape, abused its discretion.

In addition, the trial court abused its discretion when it allowed evidence that blood was found on the back of Lilly's pants when there could be no determination as to the type of blood (whether it was human or animal blood) or as to the age of the blood. Moreover, the three co-defendants had killed a goose earlier in the day, the carcass and blood of which were found in the trunk of Benjamin Lilly's car.

Finally, the trial court refused to allow the defendant to stipulate that he was a convicted felon, instead allowing the prosecution to admit a prior malicious wounding conviction.

Coe v Commonwealth, 231 Va. 83, 340 S.E. 820 (1986) held that when relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy must be weighed against tendency of proffered evidence to produce passion and prejudice out of proportion to its probative value.

In examining the issues at hand Lilly maintains that the inflammatory nature of the photographs and videotape, the testimony regarding the unidentifiable blood on Lilly's pants, and the fact that the trial court would not allow Lilly to stipulate that he was a convicted felon outweighs their probative value. In particular, there was absolutely no reason, except for inflaming the jury, that the Commonwealth needed to introduce

Lilly's felony conviction when he agreed to stipulate this element.

15. Did the trial court err when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.333-357, 1437-1441, 1688-1691)

The defendant was erroneously advised by the government that such a test was voluntary on his part. Based on this statement, he refused this test.

His refusal was used as evidence against him. It is completely unfair for the defendant to be advised erroneously and then the government to get the benefit of his refusal. This could create all types of abuse in the future on the part of police. Clearly the admission of this testimony was in error. It has been held that silence cannot be used against a defendant. Escobedo v. Illinois, 378 U.S. 478 (1964). Certainly an erroneous statement by the government causing the defendant to engage in a course of conduct should also not be used against the defendant.

16. Did the trial court err by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1438-1441)

A juror who has knowledge of specific acts of misconduct not related to the crime should not be seated. As a matter of Constitutional guarantee, the accused is entitled to a fair trial. Cases in Virginia have held that if certain preconceived

opinions of jurors (for example, stemming from newspaper articles) cannot be removed by the trial judge, those jurors should not be seated.

However, in this case a juror learned of other specific acts not related to the murder charge from a newspaper article (A.36), which told of Appellant being on parole.

It is submitted that this juror, having knowledge of Appellant's prior criminal record, should have been struck for cause.

17. Did the trial court err in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Appellant is mindful of Chandler v. Commonwealth, 249 Va. 270 (1995), which held that Chandler's girlfriend's statements against her penal interest were admissible. The girlfriend's statement described riding in an automobile with Chandler and others to obtain a gun, and Chandler's discussion about "going in, robbing the store and leaving." The girlfriend's statement also contained other statements further inculpating Chandler. The Chandler case appears to be the first case in Virginia that allowed the confession or statement of a co-defendant that was not exculpatory to the accused. It is submitted that Chandler and subsequent cases created a "new"

exception to the hearsay rule and violates the defendant's 6th Amendment rights to confront and cross-examine.

The rule in Chandler has been upheld in subsequent cases, the most recent of which was Randolph v Commonwealth, 24 Va. App. 345 (1997). This case involved the admission of a co-defendant's statement during a joint trial with the defendant. This case also held that the confrontation clause was not violated by the admission of such a statement. This statement was allowed although made after the conspiracy had ended.

(From a reading of Chandler or Randolph, there is nothing to indicate that any statement of a police officer was admissible, nor were the opinions of a police officer admissible. The entire statement admitted in Chandler at page 278 concerned the factual conduct of Chandler's girlfriend; about Chandler robbing the store and about her acting as the driver of an automobile in the commission of this crime.

This court held that the girlfriend's statement qualifies as admissible hearsay and quoted Ellison v Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978), (citing Hines v Commonwealth, 136 Va. 728, 117 S.E. 843, (1923).

In Ellison, it was the defendant, Ellison, (not the Commonwealth), who sought to have a statement admitted given by Joseph Brown indicating that he was the perpetrator of a crime. This statement was exculpatory and aided Ellison.

In Hines, (also quoted in the Chandler case) a rule (that at the time was beneficial to the defendant), was adopted that was

"out of line with the current of authority" and held that the evidence of an extra judicial confession exculpatory of the accused and made by a dead or otherwise unavailable witness, is admissible as an exception to the hearsay rule. (Please note in Hines that this was again the defendant who sought introduction of a hearsay statement). The Court held that the evidence of an extra judicial confession exculpatory of the accused was admissible.

The same rule was later affirmed in Newberry v Commonwealth, 191 Va 445, 61 S.E.2d 318 (1950), (requiring the statement to be exculpatory to the defendant), but none of these cases has ever allowed, prior to the Chandler case, these statements to be used upon the request of the Commonwealth. In these cases, the person who made the statement was not present in court. It is submitted that there has not been a well established hearsay rule in the State of Virginia that allowed these statements to be used by the Commonwealth. The Commonwealth had such statements exculpatory to the accused, admitted against the government, because the Commonwealth does not have the right to confrontation. The rule established in Chandler creates an exception to the hearsay rule, which it is submitted cannot be used against the defendant, because it bars his right to confront that witness.

It is further submitted that in none of these cases were the opinions of a police officer, expressing his belief in the defendant's guilt, allowed to be entered as evidence.

As further proof that this rule was not intended to be used

by the Commonwealth, it is submitted that Chambers v Mississippi, 410 U.S. 284, 93 S.Ct. 1039 (1973), makes this clear. This was a Mississippi rule barring, (in Mississippi one cannot not call a witness and then impeach him), the admissions of declarations against penal interest, which the defendant in Chambers sought to have introduced. (Chambers sought to introduce a confession and other admissions that McDonald had killed the person, for impeachment). The Court refused to admit, on behalf of the defendant, evidence of a third party confession and statements against third parties. The United States Supreme Court in Chambers stated that the Third Party Confession should come in for the benefit of the defendant and further stated, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." The Court found that such exclusion denied the defendant's due process of law and reversed, finding that the right to confront and cross examine a witness has long been recognized as essential to due process.

The admission of such a statement is historically discussed in Ellison, at 404. This rule, which apparently had been adopted solely for the defendant's benefit, was "out of line with the current of authority". At Ellison, they particularly stated that the admission of this rule, "of an extra judicial confession, exculpatory of the accused and made by a dead or otherwise unavailable witness is admissible as an exception to the hearsay rule".

There is nothing indicated in the Virginia cases, prior to

Chandler, that the rule which has been narrowly interpreted by this Court, should ever allow the Commonwealth to introduce a statement of third party implicating the defendant as was done in this case and in Chandler; and there is equally no language in the prior opinions allowing the statements in such a written confession containing statements of police officers that they believed the third party was telling the truth about the defendant killing a victim.

The rule of the admission of a declaration against interest or a confession prior to 1995 as an exception to the hearsay rule was only admissible in approximately five states, Virginia being one of them.

The statements in Chandler and the subsequent cases violate the constitutional rights of the defendant and certainly the statements of the police officers were hearsay.

18. **Did the trial court err when it determined that a co-defendant's statement met the criteria set forth in Chandler v Commonwealth, 249 Va. 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)**

The Commonwealth over the Defendant's objections, introduced an out-of-court statement made by a co-defendant that specifically addressed the issue of guilt of the Defendant. The trial court held, after determining that Mark Lilly was unavailable, that his statement was admissible under Chandler v Commonwealth, 249 Va. 270, 455 S.E. 2d 219 (1995). Chandler

relied on Ellison v Commonwealth, 219 Va. 404, 247 S.E.2d 685 (1978) which holds that the confrontation clause will be satisfied if the following requirements are met:

1. Witness unavailable
2. The statements are against the declarant's penal interest making the statement inherently reliable

When examining Mark Lilly's statements to Investigators Price, Fleet and Hamlin it becomes clear that Mark Lilly was lying to them and attempting to give statements which would serve Mark's own desire to exculpate himself. Especially when it is taken into account that Mark Lilly was told the penalties he was facing and being encouraged by Fleet and Hamlin, on page A.2323 of Mark Lilly's statement to them, not to "take the rap" and that he was not the one who pulled the trigger.

In the first interview conducted by Price, (A.2257) Mark Lilly describes Gary Barker as his "brother's buddy" when in fact Barker and Mark Lilly were living together in a single bedroom mobile home, which they had rented from Alfred Falls. (A.2430, 2433) In addition Mark Lilly contradicts that assertion when he tells Fleet and Hamlin during the second interview, on page 2 of his statement to them (A.2319), that Ben came over to their trailer when Barker and Mark Lilly were still in bed.

Mark Lilly goes on to tell Hamlin that they had been drinking liquor and were drunk before the break-in at Danny Sanders' home, but according to the co-defendants' own statements they didn't have liquor until they stole it from Sanders' home.

The excuse of drunkenness is used throughout the interviews by Mark Lilly to distance himself from criminal activity and lay the blame at the feet of his brother and not the man he is living with. When Mark Lilly is asked where all the liquor came from, he implicates Ben as the sole one who stole it out of Danny Sanders' home. Specifically Price asks, "and when you say 'they got it out of a house', who are you talking about 'they'?" Mark replies "Ben". (A.2258) Price then asks "talking about Ben and who else?" and Mark Lilly then replies "Lilly, just Ben." Ibid. Price asks again "Just Ben, or Gary was with them?" Finally Mark Lilly admits " we was all on it." This admission makes it clear that Mark Lilly is trying to shift the blame away from himself and Gary Barker. Further, a reasonable inference can be drawn that Mark Lilly realized that Barker had admitted to Price that "they" had gone into Sanders' home when Price asked Mark Lilly again whether it was "just Ben or was Gary with them." In addition, when Price asks where the Sanders home was, Mark Lilly replies "somewhere in Floyd is all I can tell ya." (A.2258) When Mark Lilly is asked by Hamlin (A.2320) about the whose house was broken into, Mark Lilly denies knowing whose house it was and at first can only "guess" that he went in. According to Sanders, Mark Lilly had been to Sanders' home on several occasions, knew where Sanders' guns were kept and knew that Sanders worked out of town. (A.1626, 1627, 1630) On A.2259, Mark Lilly again gives another self-serving statement when asked by Price what other things were taken out of the Sanders home. Mark Lilly replies "I

don't, I don't really know, you know, everything that was got out cause I was drunk." When questioned further by Price, Mark Lilly gives a detailed account of what was taken. (A.2259-2260) When asked whose residence it was Mark Lilly gave no verbal statement, but according to Price, Mark Lilly indicated that he did not know whose home it was or its location. (A.2289) However, it is clear from Sanders that Mark Lilly had been in Sanders' home on several occasions.

As the questioning turns toward the abduction, robbery and murder Mark Lilly again distances himself from these events. When asked by Price if they all got in Alexander DeFillippis' vehicle, Mark Lilly gives yet another self-serving statement on page A.2263, that he "had to or get left man, I was so drunk." Mark Lilly tells Hamlin on page A.2322 that he didn't get out of the car when DeFillippis was robbed, but when he testified at the sentencing hearing in February of 1997, Mark Lilly admitted that he was the one who robbed DeFillippis. (A.3095, 3099)

When giving statements to Price, on page A.2271, about the time when the murder takes place Mark Lilly states that he nor Barker ever got out of the car. Again a self-serving statement that not only attempts to protect Mark Lilly, but Barker as well. However, it was clear from both the physical evidence and statements by Barker that both Mark Lilly and Barker got out of the car at the scene of the murder. The money clip found on the scene was identified as being the same one taken from Sanders' home and the one that Mark Lilly claimed at residence of Warren

Nolan and Patricia Quesenberry. (A.1591-92, 1605) Moreover, Barker stated that Mark Lilly got out of the car and they laughed at DeFillippis when the victim was stripped.

When asked about the distance that DeFillippis was shot by Ben Lilly, Mark Lilly stated that the distance was ten to fifteen yards on page fifteen of Mark Lilly's statement, while Barker describes the shots as coming from point blank range. Mark Lilly does not mention that he and Barker laughed at the victim when he was stripped down to his underwear, rather Mark Lilly states to Price "I don't know." (A.2268)

When Mark Lilly is asked questions about the robberies that took place immediately after the murder, he cannot remember that Barker had the murder weapon and used it to commit the robbery. When asked about taking a twelve-pack of beer from the first store, Mark Lilly states to Price "... I was so drunk, I don't do that shit, you know, if I'm sober." " I had money in my pocket." (A.2273) When asked if he got money from the first robbery Mark Lilly initially states "They got some." Only after subsequent questioning does Mark Lilly admit to Price, ibid, that he received a share of the money.

In regard to the second robbery in Giles, Mark Lilly states that "they got their stuff", not that he took his share as Barker suggested. (A.2278)

On page A.2279 in his statement to Price, Mark Lilly denies taking the murder weapon when he fled from the car when police arrived, even though the gun was found in the direction he fled.

However, the most illuminating fact is Mark Lilly's testimony, given under oath, where he admits lying to Price, Fleet and Hamlin because he was scared when Price started talking about all those life sentences and decided to "(t)hrow it off on somebody else." (A.3096) When asked why he did not testify at Ben's trial Mark Lilly responded "I hadn't been to court yet" and that his "... lawyers told me that it was in my best interest to keep my mouth shut, so that's what I did. I took the fifth." (A.3096, 3100)

The appellant argues that Mark Lilly was, at every opportunity, trying to distance himself from his brother and place himself in the best possible light in order to avoid the life sentences and possible death penalty that Price had mentioned.

When applying the 6th through the 14th Amendments of the United States Constitution to the matter at hand we know that Mark Lilly's statements, besides being contradictory in themselves, more importantly are inconsistent with the facts, the physical evidence, and the other witnesses' statements. One of the confrontation clause's purposes is to allow the defendant to confront his accusers, and to place these accusers under oath. When placed under oath Mark Lilly admitted he lied to the Investigators and refused to testify at the trial in order to protect himself.

Finally, even the trial court had some trouble in determining whether the statements made by Mark Lilly were

against his penal interest when it stated that "...the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy." (A.2227)

19. Did the trial court err when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1477-1479, 1516-1517)

Not only are prosecuting attorneys under a duty to prosecute, but they are under a duty to see that the accused gets a fair and impartial trial. McClane v Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960). Jones v Commonwealth, 196 Va. 10, 82 S.E.2d 482 (1954), further held that the Commonwealth Attorney should refrain from observations or remarks that evidence feelings of prejudice.

Certainly this rule was not followed in the matter at hand, when a photograph of the victim in life was displayed in front of the jury.

21. Did the trial court err when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1984-1995, 2000)

Some of the tests and reports in this matter were not conducted by Dr. Oxley, and are hearsay. However, the trial court ruled that they were admissible under the business records exception to the hearsay rule. Lilly maintains that this was error on the part of the trial court.

23. Did the trial court err when it refused to declare a mistrial after a co-defendant, (Barker) read an article in

the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1452-1463, 2113-2114)

Early in the trial there was a motion to sequester the witnesses, which the trial court granted. However, in spite of this sequestration order, Barker elected to read newspaper accounts of the ongoing trial in violation of the trial court's order. Appellant maintains that if a sequestration order is to have any validity it must bind the witness to refrain from discussing the case and abstain from reviewing media descriptions of the proceedings. Moreover, sequestering the witness plays an important role in assuring a fair trial to both sides.

24. Did the trial court err when it allowed a police officer (Officer Whitset) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.242-278, 361-366, 2197, 2348, 3025-3026)

Officer Whitset asked the defendant, "what does a murderer look like?". The defendant's alleged response was, "me". Clearly, this was an incriminating statement and should have been suppressed. The defendant also stated he was going to hell to meet his brother, which was also in response to a question by the officer.

25. Did the trial court err when it allowed statements allegedly made by the Defendant to Chief Whitset when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.247-278, 361-366)

On the night in question Appellant was placed in a patrol car after being taken into custody by officer Randy Tilley. Shortly thereafter Chief Whitset arrived on the scene and positioned himself outside of the vehicle in which Benjamin Lilly had been placed. Whitset admitted that he questioned Lilly about the identity of the others in the car, and whether those who had fled were armed. (A.258-261) Subsequently to this questioning Whitset states that Lilly asked Whitset to "do him a favor." (A.261-262) This "favor" was to put Whitset's shotgun in his mouth and pull the trigger. Whitset refused and stepped back away from the car. (A.274) Then Whitset asked Lilly "what does a murderer look like?" In response Whitset stated that he thought he heard Lilly say "me." (A.268) Whitset admitted that at the preliminary hearing he had "solicited" the question but "wouldn't construe it as being incriminating." (A.268-269) Moreover, Whitset knew at the time of the questioning that multiple armed robberies had taken place when he solicited the question from Lilly. (A.271) Whitset also stated that he had trouble hearing Lilly when he stepped away from the vehicle. (A.260)

The appellant maintains that Miranda applies to the matter of whether the statement was admissible against Lilly. There is no doubt that Lilly was in custody during the time that the above stated conversation took place meeting the first requirement of Miranda. The next issue is whether the statement was voluntary as the trial court held or whether the response "me" was solicited by the officer as Whitset stated. Whitset admitted on the day of

the motion hearing, as he did at the preliminary hearing, that the response was "solicited" by him. Moreover, when asked on cross-examination Whitset admitted that he had backed away from the vehicle in which Lilly was sitting. (A.274) This statement was not initiated by Lilly, rather it was solicited by Whitset and violates Lilly's rights as guaranteed by the U.S. Constitution specifically his fifth and sixth amendment rights through the fourteenth amendment.

In addition, on December 7, Whitset stated that he thought he heard Lilly say "me". However, when called to testify at the preliminary hearing and at the motion hearing Whitset stated that he was shocked by Lilly's response and the reason he said "thought" was because he only wanted to verify what Lilly had said. However, Whitset admitted that he had trouble hearing Lilly when he was backed away from the car, as he was when this statement was allegedly given. Furthermore, Whitset admitted that his memory was better on December 7 than at the preliminary hearing or at the motions hearing.

The appellant maintains that the trial court erred when it allowed this statement in because it was speculation on Whitset's part, and that its admission was a violation of Lilly's Miranda rights. Evidence placed before a jury is not intended to be mere guesswork; rather, Whitset thought he heard Lilly or he didn't. However, when you examine the fact that Whitset asked Lilly what he had said and moved closer to the car a reasonable conclusion can be drawn that Whitset was not certain what Lilly had said.

26. Did the trial court err when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.2372-2376, 2388)

Approximately five hours prior to the murder, co-defendant Barker made statements about shooting his best friend (A.2400, 2404, 2504-2516) to Joyce Lang. Such statements alarmed her to the extent that she refused to allow her son to go with Barker.

This evidence was favorable to the defendant and Section 8 of the Virginia Constitution, as well as the United States Constitution, allow the defendant to call for evidence in his favor.

Barker had the murder weapon and admitted he possessed the same shortly after the murder. These statements would further advance the Appellant's theory that Barker was the trigger man.

27. Did the trial court err when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution? (A.2677-2680)

There was more than a small amount of evidence, or "a scintilla" to support this instruction. There was evidence of large amounts of alcohol being consumed, as well as the statement of the Appellant.

28. Did the trial court err when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to

the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2763-2776, 2794-2795, 2801-2805)

During the Commonwealth's closing argument the Commonwealth's Attorney pointed the murder weapon at the defense counsel and/or the defendant; defense counsel objected to said action and requested a mistrial. (A.2763, 2772) The trial court in ruling on the Defendant's motion called the motion "ridiculous" before the jury. (A.2764) This Court held in Compton v Commonwealth, 190 Va. 48 (1949) that the "[r]ulings made in words or manner indicating antagonism or resentment toward counsel may convey the impression that the feeling includes also counsel's client." First and foremost, the Appellant argues that objecting to someone pointing a gun in counsel's direction is a natural action and should not be referred as ridiculous. However, the actual harm came from the statement by the trial court. By angrily calling the defense motion ridiculous the trial court gave the jury the impression that it was appropriate to point the gun at the defense, effectively undermining defense counsel's creditability with the jury. Appellant argues that this antagonism was uncalled for, inappropriate and constitutes reversible error. The aforesaid statement of the trial court clearly indicated antagonism or resentment by the trial court which was prejudicial to the defendant. Moreover, defense counsel requested a corrective instruction in an attempt to lessen the effect of the trial

court's statement, but again the trial court refused to grant any corrective instructions to the jury. (A.2774-2777)

29. Did the trial court err at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2970)

Although there is little authority on the proffered jury instruction, there is abundant authority in Virginia on closely related matters. A similar instruction has been given involving the grades of the offense. Sanderson v Commonwealth, 200 Va. 51, 103 S.E.2d 800 (1958).

30. Did the trial court err when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2976-2977)

It is submitted that it was error to refuse this instruction. Lockhart v. McCree, 476 U.S. 162 (1986). It is true that the Stockton Case states that this instruction should not have been given, but it is submitted that the Constitution calls for its inclusion.

33. Did the trial court err when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution? (A.359-361)

Appellant concedes that Virginia case law has held that Virginia's death penalty meets all constitutional requirements. However, Appellant argues that the death penalty constitutes

cruel and unusual punishment. The Virginia statute is vague in both the "vileness" and "future dangerousness" issues and Appellate asks this Court to consider additionally the brief filed in the trial court Record and incorporates the same by reference.

34. Did the trial court err when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2228-2232, 2250)

Without question the government violated the trial court's discovery order. The defense was not allowed to hear Mark Lilly's devastating taped statements until after the trial began. (A.2228-2232) Although the Commonwealth had provided a written copy of the transcript, it did not provide a copy of the audio tape. However, the trial court's discovery order specifically stated:

> All alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist (in substance or verbatim), including, but not limited to audio tapes, video tapes, film, shorthand notes, print, typing or handwriting. (A.48)

The government violated this discovery order in violation of the defendant's rights.

CONCLUSION

It is submitted that any one, or a combination of the errors assigned, would entitle the Appellant to a retrial in this matter. In addition, Appellant requests to be allowed to present

oral arguments in support of this Appellant Brief.

BENJAMIN LILLY

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We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Appellant Brief have been mailed to the Clerk of the Supreme Court of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia 23219, (804) 786-9527; on this 7th day of January, 1998. In addition, Appellant requests to be allowed to present oral arguments in support of this Appellant Brief.

Christopher A. Tuck

IN THE SUPREME COURT OF VIRGINIA
at Richmond

BENJAMIN LEE LILLY,	)	
	)	
Appellant,	)	
	)	Record Nos. 972385 & 972386
v.	)	
	)	
COMMONWEALTH OF VIRGINIA	)	
	)	
Appellee.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, Benjamin Lee Lilly, by counsel, and pursuant to Rule 5:39 of the Rules of the Supreme Court of Virginia petitions this Court for a rehearing on the issues described below.

I. THE COURT ERRED IN UPHOLDING THE ADMISSION OF MARK LILLY'S OUT OF COURT STATEMENT

This Court's conclusions regarding the admissibility of Mark Lilly's out of court statements were unreasonable conclusions of law and applications of fact, and left uncorrected violations of Benjamin Lilly's Sixth Amendment right to confrontation and Fourteenth Amendment right to due process.

Case after case in the Supreme Court of the United States makes clear that portions of hearsay declarants' statements which are inculpatory of the accused must be subject to the Sixth Amendment right to confrontation and cross-examination. In Douglas v. Alabama, 380 U.S. 415 (1968), the Supreme Court held that the prosecutor's reading of a nontestifying codefendant's statement inculpatory of the accused under the guise of refreshing his recollection violated the Confrontation Clause. The Court later recognized that the violation in Douglas was not as serious as it was in a case in which the statement was actually offered as substantive evidence. Bruton v. United States, 391 U.S. 123 (1968). In that case, like Lilly's, the codefendant's statement was admitted as substantive evidence.

> Even greater, then, was the likelihood that the jury would believe [the declarant] made the statements and that they were true - not just the self-incriminating portions but those implicating Petitioner as well. Plainly, the introduction of [the declarant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since [the declarant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Bruton, 391 U.S. at 127-128. The Court reiterated its objections to the use of a codefendant's hearsay statements as substantive evidence against the accused in Lee v. Illinois, 476 U.S. 544 (1986) (Sixth Amendment violated where presumptively unreliable statement of codefendant introduced against accused at joint bench trial).[1] Despite this clear guidance from the Supreme Court, this Court found Mark Lilly's statements admissible.[2]

[1]This Court relies on Raia v. Commonwealth, 23 Va. App. 546, 478 S.E.2d 328 (1996), in support of its conclusion that the trial court's admission of Mark Lilly's statement was not in error. The Raia Court attempts to avoid the clear dictates of Bruton and Lee by arguing that those cases involved joint trials. Id. at 549, 478 S.E.2d at 330. In neither case did the Supreme Court provide such a basis for limiting their holdings. It is clear that the damage done by the inability to cross-examine a witness against the accused is unaffected by whether or not the witness is being tried in the same action. Each and every argument underlying Douglas, Bruton, and their progeny is applicable to the instant case.

[2]Without acknowledging Douglas, Bruton, or Lee, this Court relies on White v. Illinois, 502 U.S. 346 (1992). White, however, does not concern the presumptively unreliable statements of a codefendant. White considers only whether to impose an unavailability requirement on the hearsay exceptions of excited utterance and statements made in the course of medical treatment.

a. The statement against interest exception is not "firmly rooted"

Hearsay may be admitted without violating the Confrontation Clause if it falls into a "firmly rooted" hearsay exception. Ohio v. Roberts, 448 U.S. 56 (1980). No "firmly rooted" exception is present in Lilly's case. Those exceptions which the Supreme Court has deemed to be "firmly rooted" are those which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection [of the Confrontation Clause]'." Ohio v. Roberts, 488 U.S. at 66 (1980), quoting Mattox v. United States, 156 U.S 237, 244 (1895). As this Court noted, "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Slip Op. at 21, quoting White v. Illinois, 502 U.S. 346, 357 (1992). The Supreme Court has found numerous hearsay exceptions to be firmly rooted. Ohio v. Roberts, 448 U.S. at 66 n. 8 (dying declarations, business records, public records) (internal citations omitted)); California v. Green, 399 U.S. 149, 165-168 (1970) (preliminary hearing testimony); Manchus v. Snubbs, 408 U.S. 204, 216 (1972) (prior trial testimony); Mattox v. United States, 156 U.S. 237, 244 91985) (first trial testimony). The Supreme Court has not found, however, that the statements against interest exception qualifies for this status. Williamson v. United States, 512 U.S. 594, 605 (1994).

In fact, far from suggesting such statements are inherently reliable, the Supreme Court has found that statements of codefendant shifting blame to other defendants are presumptively unreliable. Lee v. Illinois, 476 U.S. at 543. A presumptively unreliable statement cannot be the basis of a "firmly rooted" hearsay exception. See, e.g., Douglas v.

Alabama, supra, 380 U.S. 415; Bruton v. United States, supra, 391 U.S. 123; Lee v. Illinois, supra, 476 U.S. 544; Williamson v. United States, supra, 512 U.S. 594.

b. Mark Lilly's statement was not a statement against interest

Even if the statement against interest exception is deemed to be firmly rooted, this Court's conclusion that those portions of Mark Lilly's statements exculpating himself and inculpating Benjamin Lilly as the triggerman constituted statements against interest is patently unreasonable.[3] The notion that statements against interest should be admitted as hearsay is grounded in the belief that reasonable people will not make self-inculpatory statements that are not true. See Williamson v. United States, 512 U.S. at 603-604. Thus, there is no basis to vest self-exculpatory statements with any indicia of credibility not afforded ordinary hearsay. The suggestion that these exculpatory statements are somehow more credible as a result of their proximity to inculpatory statements has been expressly rejected by the Supreme Court. "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." Williamson v. United States, 512 U.S. at 599.[4]

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[3]Lilly notes that the Commonwealth retains a great deal of control over whether a criminal defendant will be unavailable for purposes of invoking the statements against interest exception. If the Commonwealth believes that the value to the prosecution of one codefendant's statements will diminished by exposure to cross-examination, it can simply delay the codefendant's trial him that when he takes the stand in his codefendant's trial he will avoid cross examination by invoking his right to silence. The prosecution thereby gains the advantage of admitting the statement without exposure to cross-examination.

[4]This Court has attempted to avoid the dictates of Williamson, which held that a statement like Mark Lilly's was not admissible under the federal rules, by arguing that the entire decision was inapplicable because it was based on a federal rule. Chandler v. Commonwealth, 249 Va. 270, 279, 455 S.E.2d 219, 225, cert. denied, 516 U.S. 889 (1995).

The Supreme Court has held that statements of codefendants are "presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread the blame, curry favor, or divert attention to another." Lee v. Illinois, 476 U.S. at 545. As Justice O'Connor has pointed out "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially the truth that seems particularly persuasive because of its self-inculpatory nature." Williamson v. United States, 512 U.S. at 599-600. Mark Lilly was trying to shift blame to Benjamin Lilly for the far more serious crimes while he implicated himself in more minor criminal activity. That is clear, not only from his statement, but also from the fact that Mark Lilly admitted that was his intention. A. 3096. As the Court found in Lee,

> Even Justice Harlan, who was generally adverse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption."

Lee v. Illinois, 476 U.S. at 541-542, quoting Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Mark Lilly's testimony has withdrawn any basis the Court could have for assuring his authorization or adoption of the original statement. His testimony is also is powerful evidence of the effect cross-examination would have had to benefit Lilly.

c. This Court's analysis of reliability was flawed

This Court held that Mark Lilly's statement was reliable because aspects of the statement were "independently corroborated by Barker's testimony, by the physical evidence,

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Such reasoning may be persuasive with regard to any Confrontation Clause arguments, but the Court's language regarding the meaning of the statements against interest exception is still persuasive.

and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." Slip op. at 20 (no record citations provided). The Supreme Court has expressly held that such comparisons of the out of court statement with other evidence are insufficient to find the statement reliable. Idaho v. Wright, 497 U.S. 805 (1990). The Court held that to support a statement's reliability on this basis "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial," and that the existence of such collateral corroboration "would be no substitute for cross-examination of the declarant at trial." Id. at 823. The Wright court concluded that the reliability of the out of court statement must be based on the "totality of the circumstances that surround the making of the statement." Id. at 820. Subject to this proper test, the unreliability of Mark Lilly's statement is manifest. The record reflects that Mark Lilly made his statement because he was scared when the interrogating officer began to threaten him with life sentences and decided to "(t)hrow it off on somebody else." A 3096.

Furthermore, any reliance by this Court on Hines v. Commonwealth, 136 Va. 728, 117 S.E.2d 843 (1923), is misplaced. In Hines, this Court determined that a statement against interest was admissible so long as there was something "substantial other than the bare confession to connect the declarant with the crime." Id. at 748, 117 S.E.2d at 849. This standard was obviously intended to govern the admissibility of confessions of declarants which exculpated the accused. Because the government, against whose case such a statement would be admitted, has no constitutional right to confrontation, such a forgiving standard is appropriate. A standard governing admission of statements which will divest the defendant of his constitutional right to confront the witnesses against him, however, must surely be

higher.

d. Mark Lilly's statement does not bear sufficient indicia of reliability under any test

Even if the Court determines it was correct to consider external evidence to determine the reliability of Mark Lilly's statement, its conclusion based on the facts was absolutely unreasonable.[5] The Court makes its bare conclusion that Mark Lilly's statement is corroborated by other evidence without any citation to or support in the record. In fact, the record contradicts this Court's conclusion in many respects.

First, Mark Lilly's statement is not consistent with the physical evidence at the scene. The only physical evidence at the scene was the victim's glasses and Mark Lilly's money clip. A. 1591-92, 1605. Mark Lilly stated, however, that he never got out of the car while at the scene.

Second, Mark Lilly's statement is not consistent with Gary Barker's testimony. Mark Lilly stated that he was unaware of how the victim became undressed because he (and Barker) never exited the car. Gary Barker stated that he and Mark Lilly both exited the car and laughed at the victim's state of undress. A. 2062. Mark Lilly stated that the victim was shot from a distance of ten to fifteen yards. A. 2268. Gary Barker stated that the victim was shot at point blank range. A. 2148.

Third, the Court's assessment of the credibility of Mark Lilly's statement ignores entirely Mark's Lilly's own testimony that he made the statement because he was scared and

[5]Lilly notes that this Court was unable to make a reasonable determination of the totality of the circumstances on appeal as it is prohibited from considering any facts not favorable to the Commonwealth. Slip Op. at 3.

wanted to put the blame onto somebody else. A. 3096.

II. THE COURT ERRED REGARDING THE VOIR DIRE OF JURORS REGARDING PAROLE INELIGIBILITY

The trial court's refusal to allow Lilly to voir dire the jury regarding the possibility of a sentence of life without parole violated three interrelated, fundamental requirements in death penalty cases: reliability, mitigation, and confrontation. See Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1986); Gardner v. Florida, 430 U.S. 349 (1977). It is a well established Eighth Amendment requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death penalty]." McCleskey v. Kemp, 481 U.S. 279, 306 (1987); Lockett, 438 U.S. at 605; Skipper, 476 U.S. at 5. "[T]he Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." Walton v. Arizona, 497 U.S. 639, 649 (1990); see also Mills v. Maryland, 486 U.S. 367, 374-75 (1988)("[T]hat 'the sentencer may not . . . be precluded from considering "any relevant mitigating evidence"' is ... 'well established.'") (citations omitted); Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("[T]he jury [should] have as much information before it as possible when it makes the sentencing decision.").

Counsel and the court must be able to ensure that jurors will be selected who are able to give effect to mitigating evidence. Mills v. Maryland, 486 U.S. 267 (1988). Refusal to permit counsel to inquire of the jurors regarding parole also creates an impermissible risk that jurors will be seated who will impose a sentence based on extrinsic and erroneous information. Instruction or argument in this regard is not sufficient. Witherspoon v. Illinois, 391 U.S. 510 (1968); Morgan v. Illinois, 504 U.S. 719 (1992). A juror might sit

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did seize from Alexander V. Defilippis a 1986 Dodge Aries belonging to Ezio Defilippis with the intent to deprive Alexander V. Defilippis of possession of the automobile by means of the threat or presenting of a firearm; these acts constitute the crime of carjacking.

VA. CODE § 18.2-58.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while carjacking the automobile in possession of Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 3

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY, by force or intimidation, did seize, take and transport Alexander V. Defilippis with the intent to deprive him of his personal liberty without legal justification or excuse; these acts constitute the crime of abduction.

VA. CODE § 18.2-47; Punishment: § 18.2-10(e).

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

5

RGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 4

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while abducting Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

FOREMAN

WITNESS:

Investigator R. L. HAMLIN

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 5

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did rob Alexander V. Defilippis of his wallet, watch, clothing, and other personal belongings.

VA. CODE § 18.2-58.

A TRUE BILL

Robert K. Ross
FOREMAN

WITNESS :

Investigator R. L. HAMLIN

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 6

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm while robbing Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

Robert K. Ross
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 7

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did willfully, deliberately, and with premeditation kill and murder Alexander V. Defilippis in the commission of robbery while armed with a deadly weapon.

VA. CODE § 18.2-31.4; Punishment: § 18.2-10(a).

A TRUE BILL

Robert K. Miller
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 8

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm to murder Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL

Robert K. Miller
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY 9

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995 , in the County of Montgomery,

BENJAMIN L. LILLY, having previously been convicted of a felony under the laws of this Commonwealth, did knowingly and intentionally possess a firearm.

VA. CODE § 18.2-308.2.A.(i); Punishment § 18.2-10(f)

A TRUE BILL

Robert K. Sim
FOREMAN

WITNESS:

Investigator R. L. HAMLIN

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well, it's warm. And I said, Mark, is the gun hot? He said, yes, at which time I handed the gun back to him. I put the bullets back into the chamber and handed it back to him and about that time both Gary Barker and Benjamin Lilly came out and approached the car and at that time, I remember Gary reaching in the back seat and pulling out a 12 gauge shotgun and, ah, Ben Lilly was right behind him or close, close there with him, and Ben Lilly said, put the, the God damn guns away, and that's pretty much all I remember the guns being put into the trunk of the car. I got out of the car and went back into Cowboys and they weren't there very much longer.

Q. Did they come back into Cowboys?

A. I don't believe so.

Q. So, you saw a shotgun and a pistol?

A. Yes, sir.

Q. And you said you unloaded the gun and it was a revolver?

A. Yes, sir.

Q. And then reloaded it?

A. I reloaded it, yes.

There was a graze wound next to the entrance wound where the bullet grazed the lip, entered the lip, passed across the lip and exited the other side. Ah, a little bit of bruising on the inside of the lip, no teeth were fractured or missing. No bullet was recovered. Wound Number Two (2) was located at the angle of the left jaw, just below the lobe of the left ear, in this region (pointing). This wound was oblique and it was oriented backward. There was no, no gun shot residue incidently around any of these wounds on the skin. The bullet passed backward through the soft tissue by the jaw and exited the back tissue of the soft tissue of the back of the neck. This bullet struck no vital structures and was not a lethal wound. No bullet was recovered. Wound Number Three (3) was located in the right temporal area just above the right ear and at this point (pointing). This wound was surrounded by a small amount of bruising. Ah, the wound path was from right to left and horizontal. The bullet passed through the brain, both halves of the brain, and was recovered beneath the left temporal bone in this region (pointing). This bullet was a lead alloy

and two feet away?

A. No. Greater than that distance.

Q. Oh, --

A. How much greater, I can't say.

Q. So, it would be somewhere beyond two feet?

A. Yes, sir.

Q. Now, you indicated, ah, that there was bruising around the one in the right forehead -

A. In the right temporal.

Q. The right temporal. And what does that indicate?

A. Nothing. It's a nonspecific finding.

Q. Did it indicate, did the examination of the body indicate that there had been bleeding -

A. There had been bleeding, yes, from all of the wounds.

Q. Now, can you tell the Court the wound to the lip. There was a slight graze and then it passed through. What kind of effect would that have on a person if they were hit by that kind of shot?

A. It would be painful, but not disabling.

Q. Okay. So, it was on the back side of his jeans then?

A. That is correct.

Q. Were you able to amplify that? I didn't hear that, the, and he may have asked you that question. Were you able to amplify that blood that we're, that you found on the back of those pants?

A. No, no amplification results were obtained with that particular sample.

Q. Based on what you know about this situation, can you testify whether that's Benjamin Lilly's blood, and there, just so you'll know, there's been evidence that there was a goose that was killed and I'm going to show the witness Exhibit Eleven (11), blood on the back of the car, or a reddish material appearing on the back of the car and a dead goose. Can you tell us whether that blood came from that goose or can you tell us where that blood came from? Whose blood that is?

A. No, I cannot based upon my testing.

Q. Okay. Now, you indicated that on, in your report on October the 1st, the request for examinations

A. No, sir.

Q. So, how did you end up at Mr. Sanders or Mr. Saunders?

A. We just drove up there and was going to drink a little bit with him and he wasn't there and we decided just to go on in and help ourselves.

Q. And how did you go in?

A. Busted out the front glass in the door.

Q. And went inside?

A. Yes, sir.

Q. Did you all stay there for a while?

A. Nah, we was in and out pretty quick.

Q. All right. Did you take anything while you were there?

A. Yeah.

Q. What did you take?

A. Nine (9) liters of liquor and three (3) guns.

Q. Different kinds of -

A. Yeah.

Q. Liquor?

A. Yes, sir.

Q. Were most of them full or -

A. Yeah, they was all full.

Q. And the guns?

A. Ah, all of them had a few shells in them.

Q. Okay. Was anything else taken besides the guns and the liquor?

A. A safe.

Q. Where did that come from?

A. Ah, behind his bar.

Q. What kind was it?

A. Ah, it was, I guess like a fireproof safe.

Q. What was it made out of, if you know?

A. Ah, I'm not sure.

Q. Okay. And what did you do with those items after you took them?

A. Ah, we was, we was drinking liquor and the safe, ah, we got into it and it wasn't anything worthwhile in it.

Q. Now, where did you take the safe to get into it?

Q. Okay. And what happened there?

A. Ah, the shotgun got fired and the rifle got fired.

Q. Were they fired at anything in particular?

A. Yeah, at some goose, geese.

Q. And where were they?

A. At, in this church yard.

Q. And what did you fire?

A. I fired the rifle again.

Q. And do you know who fired the shotgun?

A. I'm pretty sure Mark did.

Q. Did you have either or both of the geese?

A. Ah, one (1) of them was flopping, it got away, but the other one (1) died.

Q. And what did you do after it died?

A. Ah, threw it up in the trunk.

Q. Do you know who carried it to the trunk?

A. I don't remember.

Q. I show you Commonwealth's Exhibit Number Eleven (11), the trunk, a photograph of a trunk with it open with a goose in it. Is that the goose that was

Price's Fork Road?

A. Ah, the car tore up.

Q. Do you know where it was near?

A. It was near the store, ah, -

Q. Did you make it through the stop light there?

A. Yeah, as a matter of fact we did and I had, and it stopped going up the hill on the other side of the light.

Q. All right. Then what did you do?

A. I drifted it back down to where it was setting when y'all found it.

Q. All right. And what did Mark and Ben do?

A. Ah, well, we, ah, was trying to take the tags off and get the liquor and the guns out of the car.

Q. What did, let me back up a second. What were they doing while you were drifting the car back?

A. Guiding me.

Q. All right. And you went a long way, if I remember correctly?

A. Yeah.

Q. Did you turn -

A. On oncoming traffic.

Q. And did you turn it off onto a side lane?

A. Yeah.

Q. And that's where it stopped?

A. Yeah.

Q. Was it on the right side or the wrong side of the road then?

A. It was on the wrong side.

Q. Okay. Then you said you tried to take the tags off?

A. Yeah.

Q. Were the tags taken off?

A. That's what we, we was trying to get the tags off and I don't remember if they come off or not and we was getting the guns and the liquor out of the car.

Q. And what were you going to do with them?

A. Ah, well, we would stash them in the woods or, or to steal us a car and get out of there.

Q. Okay. And who had the rifle at that point?

A. Yeah.

Q. And did you see where Ben went?

A. Yeah.

Q. Where did he go?

A. Over to that boy.

Q. Was the boy near a car?

A. Yeah.

Q. And what was he doing?

A. Just looking at his tire.

Q. Was the car running, or do you know?

A. Ah, I think it was running.

Q. Was he looking at a front tire or back tire?

A. Front tire.

Q. Driver's side or passenger's side?

A. Passenger's side.

Q. And Ben went up to him?

A. Yes.

Q. And where were you all then?

A. Walking towards the pine trees.

Q. And did you see what happened then?

A. Yeah, ah, he hollered - come on - and went over that way. He had the gun pointed at him and, ah, me and, I got in the passenger's side of the car and Mark got in the back of the car in the passenger's seat and Ben told the boy to get beside Mark and then Ben got behind the wheel.

Q. All right. Now, when you came up, was the person still standing by their front tire?

A. Ah, no, he was more in front of the car closer to Ben.

Q. And where was Ben at that point?

A. Ah, right at the right, at, right at the driver's front fender.

Q. Did you see if Ben had anything in his hand?

A. Yeah, he had the pistol in his hand.

Q. And what was he doing with the pistol?

A. Ah, just telling the guy to come on and give me your money or something sort of in that, of somewhere in that area.

Q. And did you see anything change hands

between the two (2) of them?

A. Yeah, I seen him hand him his wallet.

Q. All right. Did you see any bills or anything?

A. Yeah, it looked like maybe just like one (1) -

MR. TURK: Your Honor, I would object. I believe he's leading the witness through the last couple of questions.

THE COURT: All right, sir. Just rephrase them. You don't have to repeat the ones that have already been answered.

Q. And then the person got in the vehicle?

A. Yes.

Q. What did you and Mark do when the car doors opened?

A. We got in. We got in the car.

Q. Did you look towards the person?

A. No, looked away from him because of the overhead light in the car.

Q. He got in the back seat?

A. Beside Mark.

Q. Ben was driving at that point?

A. Yes, sir.

Q. And where did you go?

A. We started down towards Whitethorne.

Q. Back down Price's Fork from where you had come?

A. Yes.

Q. And where were you going?

A. Ah, just basically just down the road. Ah, you, we just was going to drop him off in, where he'd have to walk to get to a phone and we ended up in Whitethorne.

Q. All right. Did the person talk to you all while you went down?

A. Yeah, he, he, ah, told us that, ah, he'd have of, ah, gave us a ride if we had of asked and, ah, and told us if we would go back and get his friend, then, ah, back at the store, then, ah, he would take us wherever we needed to go.

Q. Did you all turn around?

A. No.

Q. Ben was still driving at this point?

A. Yes, at this point.

Q. And you pulled into Whitethorne?

A. Yeah.

Q. And what happened when you got there?

A. We'd told him to close his eyes so we could get out of the car because -

Q. Who is we?

A. Me and Mark. Because he had already seen Ben's face and, ah, we told him to close his eyes.

Q. And did you and Mark then get out?

A. Yeah, when he closed his eyes.

Q. And who else got out?

A. Ben got out.

Q. Now, did anybody have any firearms at that time?

A. Yeah, the, ah, the pistol was, ah, in, ah, the front of Mark's pants.

Q. Did Mark have the pistol back then?

A. Yeah. It went back and forth between

hands.

Q. And Mark was in the back seat with him?

A. Yes.

Q. And what did you do with the rifle?

A. It was still laying in the car.

Q. What part of the car?

A. Ah, in the front where I was sitting. In the front passenger's, in the floorboard.

Q. Do you know where the shot gun was?

A. Ah, I think it was in the floorboard too, in the back floorboard.

Q. Now, the shotgun, do you recall how much ammunition you had for that?

A. A, ah, I believe, I'm pretty sure we only had two (2) shells for that and one (1) of them was shot at the goose.

Q. Everybody got out at Whitethorne?

A. Yes, we sure did.

Q. Was the car still running?

A. No.

Q. Were the lights on?

A. Yeah. The, ah, not the, ah, not the headlights, but the light, marker lights, parking lights.

Q. So, the headlights were on?

A. No, the headlights wasn't on. It was the parking lights.

Q. The little yellow ones?

A. Yeah.

Q. The warning lights?

A. Yeah, on the side.

Q. And which way had you all come in? If you look over here to this diagram, down to the end is across the railroad tracks is apparently where you enter, is that correct?

A. Yeah, it's only one (1) way in there.

Q. Okay.

A. And one (1) way out.

Q. And where did you go after you went in?

A. Ah, there was a big stack of railroad ties and stuff and that's all I remember.

Q. If I could just show you Commonwealth's Exhibits Thirty (30), Twenty-nine (29), and I'm sorry, I

can't tell if it's Twenty-eight (28) or Thirty-eight (38), photographs of that area in the daylight. Do you recognize anything in these pictures?

A. Well, I thought it was railroad ties, but, yeah, the house.

Q. Okay. Would you point it out to the jury, the house on Number Thirty (30)?

A. Yeah. (Pointing).

Q. And this big stack -

A. Yes.

Q. Is what you call the railroad ties?

A. Yes, it was dark really.

Q. Now, whereabouts did you have the car?

A. Ah, it would be back this way (pointing). Back towards there.

Q. Okay. If you look in this picture, Number Twenty-nine (29).

MR. SCHWAB: Do you need to see this?

MR. TUCK: I'd like to. The witness is being examined and I have a right to see which, where he's at, and what he's -

THE COURT: You can have a, you can look at it. Go ahead.

A. Okay. It was back this way somewhere (pointing).

Q. All right. The house would be down here or the -

A. Yeah.

Q. Or the train station, whatever?

A. Yeah, it was across there.

Q. And were you all in one side of the car?

A. Yeah.

Q. Which side was that?

A. That, ah, that would be the driver's side. Once we'd all got out.

Q. What happened after you got out?

A. Ah, Mark told him to walk and, ah, (pausing) and Ben told him to take his clothes off.

Q. Did he take his clothes off?

A. Down to his underwear and his socks.

Q. What happened to his clothes?

A. They got threw in a river.

Q. What happened to him there after he took them off, if you know?

A. At the time, I thought it was funny. I guess we all did, and, ah, -

MR. JENKINS: Well, Your Honor, we object to him speculating on what the other people thought it was.

A. Ah, -

THE COURT: Yes, but I mean he can certainly testify to what -

MR. JENKINS: Said it was funny as far as he was concerned.

A. Basically, him agreeing though.

THE COURT: To, he would testify to what he felt.

MR. JENKINS: I was making an objection, son, to the Court.

THE COURT: Go ahead and answer the question that was asked, but just limit your answer to your feeling.

A. Ah, well, all right, I thought it was sort

of funny and, ah, because he'd have to walk to a, to find a phone in his underwear and his socks, I mean.

Q. Now, did you have any conversation with him before Mark told him to go on or Ben told him to take his clothes off?

A. I don't recall.

Q. And which way was he walking?

A. Ah, towards, ah, the same way we came in, that way. There's only one (1) way out and one (1) way in.

Q. All right. And how far had he walked after his clothes were taken off?

A. Fifty (50) yards or so, or fifty (50) feet or so, I'm not sure. It wasn't far.

Q. And after he started walking, what did you do?

A. I got in the driver's seat of the, of the car.

Q. And what did Mark do?

A. He got in the passenger's seat.

Q. What did Ben do?

A. Ben got in the back and he told Mark to give him the pistol back and he got out of the car and run up to him (pausing) and he turned him around and shot him.

Q. Did you hear the gun shot?

A. No, I seen flashes.

Q. One (1) or more?

A. More.

Q. And what happened to this person as the flashes went?

A. I saw him throw up his arm (describing).

Q. And then what?

A. (Pausing) Fell on the ground. Just staggered back and fell on the ground.

Q. Did Ben come back to the car?

A. Yeah.

Q. Right away or did he delay?

A. Came back to the car.

Q. And where did he get in?

A. In the, back in the back.

Q. And after he got inside, was anything

said?

A. Yeah.

Q. And what was said?

A. Me and Mark was asking him why did he do it back and forth and he said - because I've bee. in the penitentiary and I ain't going back. He said that boy saw his face.

Q. Did you leave this area right away?

A. Yeah.

Q. Who was driving?

A. I was.

Q. And where did you go?

A. It was some back roads. We winded, well, we went to the river first down in McCoy.

Q. Did Benjamin Lilly say anything else there at the scene other than what you testified to?

A. As we started moving the car a little bit and as the car started moving some he, he asked, he said, - give me a fuckin' beer.

Q. You went on down the road?

A. Yeah.

Q. Did you ever get any beer?

A. Yeah.

Q. And where did you do that?

A. Ah, with the money that, that, that guy had gave Ben. He went into the store. That -

Q. Did you and Mark go in?

A. No.

Q. And what did Ben come out with?

A. He come out with ah, I don't remember if it was a twelve (12) pack or a case and a pack of cigarettes.

Q. What kind of beer, if you remember?

A. Busch Light, or Busch, one of the two.

Q. Who was driving then?

A. I was.

Q. And where did you go from the store with the beer?

A. Down to the river, down to McCoy River.

Q. And what did you do down there?

A. Threw away anything that might have our prints on it.

A. It was all three (3) of us.

Q. So, at that point, you had the vehicle, you had the beer. Did you still have all three (3) guns?

A. Yes.

Q. Had you gotten rid of those?

A. No, we still had all three (3) guns.

Q. And who drove away from that place?

A. I did.

Q. And where did you drive to?

A. To the first store that got robbed.

Q. Is that over in Giles County?

A. Yeah.

Q. Okay. Who went, where was everyone else in the car?

A. Mark was still in the passenger's seat and I was driving and Ben was in the back.

Q. Okay. And what happened as you got to the store?

A. Well, at first we passed it and then turned around and went back and, ah, we was arguing on who was going to carry the gun in.

Q. Now, why would you want to carry the gun in?

A. We was going to rob it?

Q. Why were you going to rob it?

A. To get money to get out of town.

Q. Did you have any money with you?

A. No, not that I remember.

Q. Do you know if Mark had any?

A. No, I don't think so.

Q. Did Ben indicate whether he had any other than what he bought the beer with?

A. If it was any change off of it, that would be all he had.

Q. Where did you all park in relation to the store?

A. Right out in front of it.

Q. Had you, while you were talking about getting money to get out of town, did you talk about some place to go?

A. Yeah.

Q. And where were you going?

A. Ah, Ben said he knew some people in West Virginia. That we could hide there for a few days.

Q. So, who all ended up going into the store?

A. All three (3) of us.

Q. Do you remember who went in first?

A. Ah, no,

Q. Who ended up carrying the gun?

A. I did.

Q. And why did you take the gun?

A. I really don't know. I don't know.

Q. Did Ben say anything about taking the gun inside?

A. Yeah, he said he did what he had to do already. Something in that area.

Q. So, you all three (3) went inside?

A. Yes.

Q. What did you do?

A. Ah, took the gun and showed it to them and told them to give up the money.

Q. And when you said them, there was more than two (2) people in the store?

A. No, the guy had to get back off of the floor and open it.

Q. And the cash register came open?

A. Yeah.

Q. And who took the things out of it?

A. Mark.

Q. You still had the pistol?

A. Yes.

Q. Did you still have it out?

A. Yes.

Q. And did you take anything?

A. Ah, ah, the, ah, the stereo.

Q. Okay. The little radio -

A. Yeah.

Q. Boombox?

A. Yeah.

Q. What else besides what was in the cash register did you all take there?

A. Ah, some more beer and some gloves and stuff. I don't remember exactly what all it was.

Q. Were the gloves on a display?

up. What did you do with yours?

A. I stuck it in my front pocket.

Q. And where did you go from there?

A. Ah, to the next store.

Q. Was that in Pembroke?

A. Ah, yeah. Ah, Bill Williams' store.

Q. It's sort of right there on the main road?

A. Yeah.

Q. You pulled in, and where did you park?

A. Ah, we were, well, out front.

Q. Okay. And what happened after you got there?

A. Ah, we all got out and, ah, again we was arguing who was going to do it and, ah, I said, you know, I'll do it, you know, basically, so I grabbed the pistol again and Ben got under the driver's seat and me and Mark went in the store.

Q. And what happened when you went in the store?

A. Ah, I took the gun out and I told her to give me the money.

Q. And there was a woman working?

A. Yeah.

Q. And did she give you the money?

A. No.

Q. Did she tell you why she wouldn't give you the money?

A. She said they didn't have any.

Q. And who else was in there with you?

A. Mark.

Q. Where did you have the pistol?

A. Out in front.

Q. In your hand?

A. Yeah.

Q. And then what happened?

A. Ah, Bill Williams came into the store and grabbed me.

Q. From behind, the side or the front?

A. From behind, from like my side, he rushed me.

Q. And then what happened?

A. I, I got loose from him and, ah, and, ah,

she said, - here take it - and she threw a bag of quarters or some, a whole bunch of change onto the counter and we grabbed it and run out of the store.

Q. Now, these coins, were they in wrappers?

A. Yeah.

Q. Like they come from the bank?

A. Yeah.

Q. After you got loose from Mr. Williams, did you tell him anything?

A. No, not that I recall.

Q. Did you do anything with the pistol at that point?

A. No, not that I recall.

Q. You ran outside and then what?

A. Ah, jumped in the car and, ah, that's when, when it tore up a little ways below the store.

Q. And this is the car you got from the convenience store in Blacksburg?

A. Yes.

Q. Then where did you jump in the car?

A. I jumped in the back that time and Mark

was in the passenger and Ben was driving.

Q. All right. And who grabbed the change inside?

A. I don't remember if it was me or Mark.

Q. And you got in the car?

A. Yeah, and, ah, -

Q. Where did you go from there?

A. To where it tore up across the bridge, Pembroke bridge.

Q. Was there anyone behind you?

A. Yeah, Bill Williams. The reason I know it was him because the car was sitting in the parking lot the one, the one that we went and robbed, when we started to rob the store. I recognized it when it got behind us.

Q. And how far did it follow you?

A. It, it got, it was following us across the bridge.

Q. Did you do anything about it following you?

A. Yeah, I took the rifle, I was in the back of the seat and I took the rifle and I pointed it out the

window, pointed it up into the air and fired to let him know we had guns and, ah, he backed off.

Q. How much further did you go before the car stopped?

A. Not far.

Q. Now, did you, did the car stop on its own or did it have some kind of problem?

A. It, ah, it, ah, I guess the engine locked up. It just stopped on us.

Q. What did you do with the car?

A. We was getting stuff out of it, ah, and Randy Tilley came around the corner and Mark run over the hill and I run over the hill and I was, and, ah, I thought Ben was behind us, but he wasn't and I fell onto some rocks and Mark kept going and I set up on a rock and I seen them arresting Ben.

Q. Now, you said you were getting things out of the car?

A. Yeah.

Q. What were you getting out the car?

A. The stereo and the beer and stuff.

Q. Could you see where the car was?

A. Yeah, I could see them walking back and forth past it.

Q. And you saw Mark, I mean you saw Benjamin?

A. Yeah, I saw them arresting him.

Q. Where was he when you first noticed him?

A. He was standing beside the, on the passenger's side of the car at that time and he had his hands in the air and they made him drop to his knees.

Q. How long did you stay there?

A. Till they got me.

Q. Do you know how long that was?

A. Nah, five (5) or ten (10) minutes.

Q. Could you see all the officers?

A. Yeah, I watched them walk back and forth past me.

Q. Were their headlights on?

A. Yeah, and the blue lights and everything else.

Q. And how did you end up in custody?

A. Ah, one of them had heard me.

Q. Heard you what?

A. Ah, ah, I was sending a message to my Mom.

Q. How were you sending a message to your Mom?

A. I was, just, just told them to tell my Mom I loved her and that was it. I had the gun in my mouth. I was going -

Q. That was the deer rifle?

A. Yes.

Q. Were you still sitting?

A. Yes.

Q. And where was the butt of the gun?

A. It was at my feet.

Q. And the top was in your mouth?

A. Yes.

Q. Was the hammer cocked?

A. Yes.

Q. You didn't pull the trigger?

A. No.

Q. Why did you want to pull the trigger?

A. (Pausing) From what I seen and, and, and,

and for what I did.

Q. Why didn't you pull the trigger?

A. Because something deep down was telling me that, ah, that if I, if I had of then they would have just put it on me and all of it on me and, you know, I didn't want my family to hate me, you know.

Q. So, you put the rifle down or threw it down?

A. Yeah, I threw it behind me.

Q. Now, when you were out there, did you hear, did the police have loud speakers?

A. Yes.

Q. Did you hear them calling out names?

A. Yeah.

Q. Did they call out your name?

A. No.

Q. Did they call out Mark Lilly's name?

A. No.

Q. Do you remember any of the names they called out?

A. Yeah. They called out ah, ah, ah,

scene where the car broke down?

A. No. They, ah, they, ah, brought him in last. They found him walking on the side of the road and I didn't see him until early the next morning.

Q. All right. Did you agree to talk to the police?

A. Yeah.

Q. And you said, is that what you meant by upstairs?

A. Yeah.

Q. And you spoke with Lieutenant Price, is that right?

A. Yes.

Q. And what did he ask you about?

A. He just asked us what happened, asked me what happened and, that night, what was going on.

Q. Did you tell him anything about the names they were calling out?

A. Yeah, they asked me was that who I was with and I told them, no. I told them I was with Mark and Ben Lilly.

A. Yes, sir.

Q. At that point in time, did you point the gun at A. J. Falls?

A. No, sir.

Q. You didn't threaten him that evening?

A. No, sir.

Q. Now, did Ben have any of the weapons when he was at A. J.'s house?

A. Yes, sir.

Q. He did, and you're certain of that?

A. Yes, sir.

Q. Okay. Now, I believe you also indicated that you went down to some trailer parks after you shot the goose, is that correct?

A. Yes, sir.

Q. And then you stopped at a trailer park across from the rock quarry, I believe that's on Jennelle Road, is that correct?

A. Ah, I'm not sure which road it is, but it's -

Q. Across from the rock quarry?

A. Yeah.

Q. And that's in Montgomery County?

A. Ah, yes, sir.

Q. Is it near the road on Holiday Ford?

A. Yes, sir.

Q. Okay. So, if that was Jennelle Road, then that was the road that you were on?

A. Yes, sir.

Q. Okay. Now, did at some point in time during that evening, when you got to that trailer park, did Mark threaten anybody with that firearm, pull it out and pull the hammer back?

A. No, sir.

Q. All right. And you're certain of that?

A. Yes, sir.

Q. Now, did you indicate to A. J. that the property was stolen that was in his home?

A. Yes, A. J. knowed it.

Q. All right. Did you tell him where you had gotten it from?

A. No, sir.

5th?

A. No, sir.

Q. You were not driving Ben's car without Ben being present?

A. No, sir.

Q. You did not tell them, obviously, since you didn't see them that day that you would kill your own best friend and never regret it?

A. No, sir.

Q. Now, let's go to about 6 o'clock. You've indicated that you were out at Cowboys, is that correct?

A. Some, well, I don't remember the exact time, but we at Cowboys, yes.

Q. Was it getting dark?

A. Yes, it was getting dark, yes.

Q. And I believe you indicated that Mark Lilly got out in the car with somebody?

A. Ah, me and Ben got out of the car and, ah, a guy got in the car with Mark.

Q. A guy got in the car with Mark?

A. Yes.

Q. Was his name Ron Lucas?

A. I have no idea.

Q. Don't know what his name was?

A. No, I don't even remember what he looks like.

Q. And you came out there later and pulled out a gun, is that correct?

A. Ah, no, that's not correct. Ah, -

Q. But you did pull out the rifle?

A. Yes, but I didn't come, I, I, I had stated that, ah, that, ah, when we got out of the car and the guy got in the car with Mark, I was showing the rifle to somebody, yes.

Q. Well, Ben didn't come around and tell you to put those damn guns away and take the rifle away and put it in the trunk?

A. Definitely not.

Q. Definitely not. Now, the prosector asked you, did Bill Williams, did you say anything to Bill Williams, did you do anything with the gun? This is over at the store over in Pembroke, the second robbery, and I

believe you indicated that you didn't, is that correct?

A. Yes, sir.

Q. You didn't tell him that you would blow his head off, did you?

A. No, sir.

Q. Didn't point the gun at his forehead, did you?

A. No, sir. I was waiving it around, but I wasn't -

Q. You never pointed it at him or never told him you would blow his head off?

A. No, sir.

Q. Now, did you ever state to, do you know who Bo Hutchinson is? Clarence Hutchinson?

A. Ah, yeah, I was in jail with Bo a while back, a good while back.

Q. About a year ago?

A. Ah, way over a year, yeah.

Q. Okay. Did you tell him that you would be coming back to prison for murder?

A. No, I sure didn't.

you shaking, excited?

A. That's the first store, isn't it?

Q. The first store, Eggleston.

A. Yeah, ah, well, I was yelling. Ah, I was excited. It was -

Q. Were you pointing the gun at him?

A. I, I do not remember. Ah, I may have.

Q. You may have. You don't remember pointing the gun at him?

A. No, no, not directly at him, no. I remember -

Q. Do you remember -

A. Holding it out. I knew they seen me.

Q. You knew they seen you. You were holding it out because you were robbing the store?

A. Yeah. Well, I, I had him lay on the -

Q. You had him, had him lay on the floor?

A. I had him lay on the floor and, ah, ah, you know, I couldn't see him no more and he couldn't see me either, so, you know, -

Q. But you, you didn't tell him not to look

Q. With the gun in, in your mouth?

A. Yeah.

Q. And they heard you talking to your, about your Mom or to -

A. Ah, somebody came by. One of the cops that was walking through and I said, you know, something like - Tell my Mom I'm sorry or something like that, you know, and or I love her, or something like that, and then about, I don't know, twenty (20) or thirty (30) of them pointed guns at me and told me to put that one down and kind of woke me up a little.

Q. And you threw the gun away?

A. Yeah, I threw it behind me.

Q. After the put the twenty (20) or thirty (30) guns on you?

A. Yeah.

Q. Okay.

A. I didn't have a standoff with them.

Q. Well, you had a rifle with a scope on it, is that right?

A. But it was in my mouth. It never was

pointed in their direction.

Q. Right.

A. Never. Even when I threw it I made sure it wasn't pointed that way.

Q. The gun wasn't pointed that way. I believe you indicated you in your reports that Ben Lilly went right up into Alexander Defilippis' face, is that right, and shot him -

A. Yeah.

Q. At point blank range?

A. Yeah. Right, right at him, yes. From me to you. Ever bit of it.

Q. All right. If not closer, is that right?

A. Yeah, I guess, a little, a arm, a little over a arm length -

Q. All right.

A. And then the gun length, you know.

Q. Now, was this real close to the car?

A. Ah, it wasn't real far, but it wasn't real close. I, like I said, it was, it was, it was close, but, you know.

Q. All right. Did you hear what he said?

A. Yes, I did.

Q. Would you tell the jury what he said over the loud speaker?

A. He kept calling his brother by name and said, Mark, you know, come on out, you know, don't let them kill you. You're not the one that's really in trouble here. You're not the one that's, or the one that's really done anything wrong.

Q. All right. And that was said by Ben Lilly over the loud speaker?

A. Yes, it was.

Q. Now, Mark wasn't located in that area, was he?

A. No, he was not.

Q. Thank you. Answer any questions defense counsel may have.

THE COURT: Mr. Jenkins.

CROSS-EXAMINATION

BY MR. JENKINS:

Q. Ah, Officer Wilburn, now, do I understand

Q. All right. And then what did you do?

A. Well, he, he said something to prompt me to ask and I said what does a murderer look like anyway. I don't recall exactly what he said, but it, that lead to that question.

Q. And did he make a response to that?

A. And he said that, ah, he set back in the car again and he said, me.

Q. Did he say it loudly?

A. He, he said it loudly enough to where I could understand what he, it sounded like he said me to me.

Q. All right. And after you heard that, what did you do?

A. I said that, ah, I asked him what did he say? And he said that, ah, he was going to hell to meet his brother.

Q. Did he tell you why he thought his brother may be in hell?

A. Ah, he said that his brother committed suicide some eight years earlier. It was that, a matter

well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and

Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is

another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if

the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say

is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record Douglas v. Alabama, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. Brutan v. United States -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe Crews v. New York. I also believe I had submitted to the Court two other cases. That was an Idaho v. Wright and just to

briefly discuss Idaho v. Wright, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned

specifically in the Idaho v. Wright that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the Idaho case because the Idaho case involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is

that the whole statement can come in. The Court has seen in the Scaggs case and the Chandler case which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U. S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the

confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against

self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the

points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving

statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the

hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on Brady I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

THE COURT: All right, gentlemen, we need to set up a place in which you can review those tapes.

MR. TUCK: Is that part -

MR. SCHWAB: The tapes and a speaker are available and the witnesses are in the next room.

THE COURT: All right. Is the speaker and the tapes, I mean the speaker, -

MR. SCHWAB: Yes, but considering the proximity to the jury it might be better if they meet some place else.

THE COURT: What about the attorneys' lounge?

MR. TUCK: Why don't we use one of the rooms over here or the lawyers' lounge. That would be fine, Your Honor.

THE COURT: That would be fine or you can do it in Mrs. Cole office and obviously we want be a party, but I imagine the lawyers' lounge would be more appropriate. All right, Mr. Schwab, would you make them available -

THE COURT: All right, Mr. Clerk.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MARK LILLY: Yes.

THE COURT: Thank you, sir. Have a seat there, please, and answer questions on behalf of the Commonwealth and questions on behalf of the defense.

MARK LILLY,

A WITNESS OF LAWFUL AGE, AFTER FIRST BEING DULY SWORN, DEPOSED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. SCHWAB:

Q. Would you tell the judge and the jury your name, please?

A. Mark Lilly.

Q. Mr. Lilly, I want to direct your attention to December the 4th and 5th of last year. Were you with Benjamin Lilly and Gary Barker?

A. I'd like to take the Fifth on that.

Q. Did you, don't wish to answer any questions?

A. Yeah, I'll take the Fifth.

Q. Thank you.

THE COURT: All right. Any questions based upon his response?

MR. JENKINS: Your Honor, we, would you be willing to answer questions for the defense?

A. No, I'd have to take the Fifth.

THE COURT: All right, sir. Anything else, Mr. Schwab?

MR. SCHWAB: Not for this witness, Your Honor.

THE COURT: All right, sir. If the jury would go out just a moment, please. Y'all will lose five pounds this afternoon from, from your exercise.

THE COURT: All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth

Case# 950789 &
950790

Interview With
Mark Anthony Lilly
December 6, 1995
At the Giles County Sheriff's Office

Interviewer: Lieutenant Gary Price

Interview With
Mark Anthony Lilly

Interviewer: Lieutenant Gary Price
Date: December 6, 1995
Time: 1:35 AM

G.P. State your full name.

M.L. Mark Anthony Lilly.

G.P. Okay Mark, you need to speak up just a little bit cause I can't hear very well. Mark Anthony Lilly?

M.L. Yeah.

G.P. Spell your last name.

M.L. L*I*L*L*Y

G.P. What is your mailing address, Mark?

M.L. Post Office Box 217, Riner Virginia.

G.P. What's your date of birth?

M.L. 6/28/75.

G.P. And your social security?

M.L. 232-08-. . .

G.P. Whoa, whoa, whoa.

M.L. 232-08-3596.

G.P. 232-08-35967

M.L. Yeah.

G.P. Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions concerning some incidents that took place tonight in our county. And you initially said that you

felt like you were still under the influence and that you were not feeling very well. We went downstairs, you asked for some water, and received ice water, and during that time you tell me now that you feel like that. . .

M.L. Well, I'm not.

G.P. that you're in your facilities where you understand and you don't feel too drunk to talk to me. You understand the things that I'm gonna ask about. First off, I'm gonna read the Miranda rights that you have to you, and I want to make sure you feel like you understand these.

M.L. Alright.

G.P. **You have the right to remain silent. That means you don't have to talk to me if you don't want too. Anything that do you tell me, I can and will use against you in the court of law if there is charges brought against you. You have the right to talk with an attorney and have him or her present with you while you are being questioned. And if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements. In other words, you got a right to have a lawyer here with you. If you can't afford one, the court appoint one, and if you decide to waive your rights and talk to me, then you can still stop at any time you want too. You understand these rights?**

M.L. Uh huh.

G.P. I'm sorry, you do understand them?

M.L. Yeah.

G.P. Alright, listen to this very carefully. **Having been advised and fully understanding my rights do freely and voluntarily, without threats, promises, pressure, or coercing agree to talk with Gary Price, that's me, a law enforcement officer.** In other words, if you agree to answer questions, it's not because I'm making you do it, I'm not threatening you, you're gonna do it on your own free will. Do you understand that?

M.L. ****No Statement Made****

G.P. If you would, say yes or no.

M.L. Yeah.

G.P. Are you willing to answer questions concerning two armed robberies that occurred in Giles County tonight and incidents that led up in Blacksburg and Montgomery County earlier today, or earlier on December the fifth?

M.L. Yeah.

G.P. When was the last time you had a drink?

M.L. Well, ah. . .

G.P. It's right now, 1:30.

M.L. About dark.

G.P. About dark, which would have been about five or six o'clock. So we're talking about seven and a half hours.

M.L. We'd been drinking liquor all day, since yesterday.

G.P. When you say "we" who are you talking about "we"?

M.L. Me, Ben and Gary.

G.P. Who's Ben now?

M.L. That's my brother.

G.P. Ben Lilly?

M.L. Yeah.

G.P. And Gary, who's Gary?

M.L. Barker.

G.P. You any kin to Gary Barker?

M.L. No.

G.P. I'm going to ask you, if you would, these are the rights that I read you, and then I asked you if you understood these rights and was willing to waive them and you said that you were, and that you did understand them. If you

would sign that. That tells me, the court, the judge, whoever, that I did read the rights to you and that you understood them and agreed to waive and answer some questions. I will ask you, that if you do agree to talk with me, that you answer all of my questions truthfully.

M.L. Yeah.

G.P. Because you indicated that what has happened tonight is very bad, but you would like to talk about it. And at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred. So, if you're not completely truthful with me, then the court's just not gonna look at this confession or statement as it should. When did you and your brother Ben and Gary, when did ya'll get together today?

M.L. We've been together a few days. Well, me and Gary has, that's my brother's buddy. We run around together all the time.

G.P. Alright, on this day particularly, and when I say "this day" I'm talking about what is now yesterday, December the 5th which was Tuesday. What time did ya'll get together yesterday?

M.L. Well, we was together all day, cause Ben stayed over at our place.

G.P. Okay. When you say "our place" where is "our place"?

M.L. Over in Blacksburg.

G.P. Where about's in Blacksburg?

M.L. (Not understandable) Court Trailer Park.

G.P. Okay. What time did ya'll leave that residence this morning?

M.L. I have no idea. I'd say it was about, man, I don't really know. Besides, I've been drunk all day, I was drunk when I got up.

G.P. What have you been drinking today?

M.L. Liquor.

G.P. What kind of liquor?

M.L. Vodka, Evan Williams, Jim Beam, little bit of everything.

G.P. Did ya'll buy that different kind of liquor, or how did you come across that liquor?

M.L. They got it out of the house.

G.P. And when you say "they got it out of a house", who are you talking about "they"?

M.L. Ben.

G.P. Talking about Ben and who else?

M.L. Lilly, just Ben.

G.P. Just Ben, or Gary was with them?

M.L. Well the house (not understandable) we was all on it.

G.P. Where's the house located?

M.L. Somewhere up in Floyd is all I can tell ya.

G.P. Was that yesterday?

M.L. Day before or something.

G.P. Now, when we, was it a residence or was it a store?

M.L. Residence.

G.P. So you went to a residence, you got the liquor out, and what else did you get?

M.L. I don't, I don't really know, you know, everything that was got out cause I was drunk.

G.P. How did they get into the residence?

M.L. Kicked in the door or something.

G.P. Who actually went into the residence and brought the items out?

M.L. All of us.

G.P. So you brought out the liquor, several different bottles and different brands?

M.L. Yeah.

G.P. Any other items you brought out?

M.L. That's all that I brought out, that I cared anything about.

G.P. Okay. Did Gary bring anything out of the house or Ben?

M.L. I think they got some guns or something.

G.P. Do you know what kind of guns they brought out?

M.L. Uh, a shotgun, a rifle and a pistol.

G.P. Okay. What gauge shotgun?

M.L. I don't even know.

G.P. Is it a single shot, double barrel, pump?

M.L. Pump.

G.P. Pump, pump action?

M.L. **No Statement Made**

G.P. And the rifle, what kind of rifle is it?

M.L. I believe it was a .35.

G.P. What kind of action would it have?

M.L. Lever.

G.P. And the pistol, is it automatic, revolver, what kind was it?

M.L. I guess a revolver.

G.P. Do you know what caliber it was?

M.L. A .38.

G.P. And they all came out of a residence of Floyd County?

M.L. **No Statement Made**

G.P. Do you know who's residence it was?

M.L. **No Statement Made**

G.P. What area was it in? I don't know much about Floyd.

M.L. Ah, like on the way to Indian Valley somewhere.

G.P. Okay. On the way to Indian Valley.

M.L. Yeah.

G.P. What kind of house, was it a brick residence, wooden residence, aluminum siding?

M.L. Aluminum siding.

G.P. Do you know what color?

M.L. It was dark.

G.P. Did this happen during daylight hours or after dark?

M.L. After dark.

G.P. No one was at home?

M.L. Everything looked dark anyway, you know, no one was home.

G.P. Okay. Now up until yesterday when ya'll left, all three of you left yesterday in Blacksburg, you say you don't remember about what time that was ya'll left your house or wherever you were staying and started driving around?

M.L. Huh uh.

G.P. Was it daylight?

M.L. Yeah. About the time it started raining, I guess.

G.P. What were ya'll driving around in?

M.L. Thunderbird.

G.P. What kind?

M.L. Thunderbird.

G.P. Who's Thunderbird is it?

M.L. Well, it's a dam Mercury Cougar.

G.P. Mercury Cougar?

M.L. Yeah.

G.P. Who's was it?

M.L. Ben's.

G.P. What color was it?

M.L. Like a copper color.

G.P. Okay. Did ya'll drive it around about all day?

M.L. We drove it around for a while.

G.P. You pretty much stay in Montgomery County with that car?

M.L. Well, we tried to hang down at Floyd where the back roads are, you know. Cause the law don't go on the back roads that much.

G.P. And that was yesterday you're talking about?

M.L. Well, yeah. Yesterday, everyday, you know, we try to stay out on the back roads.

G.P. What become of that Mercury Cougar?

M.L. You know, I don't even know what happened to it. I just

remember stopping at a dam red, the car cutting out at a red light.

G.P. Your car was cutting out at a red light, it just stopped on you?

M.L. Yeah.

G.P. Who was in the car at that time?

M.L Me, Ben and Gary.

G.P. So it was still you and Ben and Gary. . .

M.L. Yeah.

G.P. riding during that time. Do you know about what time of day it was?

M.L. Right after dark.

G.P. Okay. What transpired at that time?

M.L. Well, dude wanted to get him another car.

G.P. Who wanted to get another car?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. How did ya'll go about getting another car?

M.L. Well. . .

G.P. Just be honest with me.

M.L. we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

G.P. So who pulled the gun on the dude?

M.L. Ben.

G.P. So Ben pulled the gun, which gun did he pull?

M.L. Pistol.

G.P. Same pistol that was got out of the house over in Floyd?

M.L. **No Statement Made**

G.P. Did ya'll know this dude?

M.L. That we. . .

G.P. That you got the car from?

M.L. No. I never go to town.

G.P. So you never seen him before?

M.L. Huh uh.

G.P. So Ben told this guy, said "We're gonna take your car and we're gonna take you with us."? So did all of ya'll load into the car then?

M.L. I had to or get left man, I was so drunk.

G.P. Okay. Who drove this dude's car off?

M.L. Ben.

G.P. Ben drove? Who had been up front with him, the passenger?

M.L. Gary.

G.P. Gary would up front?

M.L. Yeah.

G.P. And then that would put you and whoever this dude was in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. Well, not much of nothing man, we just rode. I was so dam scared I was sitting up against the door, man. You know, watching everybody.

G.P. Why was you scared, you had the gun didn't you?

M.L. No. I, I didn't have no dam gun, no.

G.P. Okay. So. . .

M.L. That's the first time I ever been through anything like that, you know, I didn't know how to take things, I just sat back.

G.P. Well, what was the dude saying during, I mean, was he scared or, was he asking to be let out or, begging.

M.L. He didn't act like it, he didn't act like he was scared or nothing.

G.P. How old was this boy that had the car?

M.L. Twenty-five maybe.

G.P. Anything that you remember about him? What he was wearing or anything that stood out?

M.L. I don't really remember man, I was drunk.

G.P. So he was in the back seat with you?

M.L. Yeah.

G.P. So you drove, where did ya'll drive to?

M.L. Uh, down like you're going to McCoy maybe.

G.P. So you left the Blacksburg area like you're going toward McCoy? That's what they call Price's Fork Road, White Thorne Area, McCoy down that area, is that the way you went?

M.L. Down through there somewhere. I know about where you're talking about, I just ain't familiar with it, you know.

G.P. What was ya'll going to do, what was the plan to do with, not only the car, but this guy that was in there with you?

M.L. We just needed a ride somewhere.

G.P. Okay. So you rode down toward the McCoy of Falls Area, what transpired after that?

M.L. Well, we drunk us another, another litter of liquor I think, yeah a good litter, and then they said something about wanting to go to Giles County.

G.P. Okay. Who wanted to go to Giles?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. Okay. What happened then?

M.L. We ended up down here.

G.P. Okay. Anything else happen in between there?

M.L. Nothing that you don't already know, man.

G.P. Alright. I wanna hear your side of it.

M.L. Well. . .

G.P. If you would speak up, I do have a bad time of hearing.

M.L. Me and the blond headed dude, we didn't have nothing to do with shooting him, you know.

G.P. Who's the blond headed dude?

M.L. Gary.

G.P. Okay.

M.L. We didn't have nothing to do with the shooting.

G.P. Alright. Well, tell me about it.

M.L. Well, it's kinda hard cause he's my fucking brother man.

G.P. I know that. And normally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. Especially if he done it without. . .

M.L. Is he. . .

G.P. consent of everybody. If ya'll had all said "Yeah, let's all kill him" or something, I think you need to share in it. But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

M.L. Yeah.

G.P. And he's your brother, and I understand that. But I think it's. . .

M.L. Well, is he saying that me and that other dude done it?

G.P. Well, I told you to start,

M.L. **Statement Muffled**

G.P. I'm not gonna tell you what each person said.

M.L. Well.

G.P. I simply told you before we started that they said you didn't do it. And all I'm asking you for is what you saw and what you heard. I know it's hard to say things against your family, but I think in this matter, I don't think anybody's gonna hold it against you. And as you said, I know what happened, but I need for you to tell me what happened. It's not an easy thing to talk about.

M.L. How many times was that dude shot?

G.P. I can honestly tell you, I don't know. More than once, I know that, but I do not, it didn't occur in my county so I'm not sure how many times he was shot. I'd have to ask the right people. I know it was more than once. Number one, what happened? Ya'll was going down the road, apparently you stopped.

M.L. Yeah.

G.P. Why did you stop?

M.L. Well we was all gonna get out of the car first.

G.P. Okay.

M.L. Then, Ben, you know, he just freaks out, and says "Fuck this we'll take this dude's car and we'll leave him behind."

G.P. Okay.

M.L. You know, and I'm setting up there, "Goddam what's he gonna do" me and Gary was. And they go over here beside this fucking I guess it's a dump or some fucking something, I don't know, you know, dude shoots him.

G.P. When you say "dude shoots him" which one are you calling a dude here?

M.L. Well, Ben shoots him.

G.P. Talking about your brother, what did he shoot him with?

M.L. Pistol.

G.P. How many times did he shoot him?

M.L. I heard a couple of shots go off, I don't know how many times he hit him.

G.P. Where were you when this was going on?

M.L. In the back seat of the car still yet.

G.P. So you never got out of the car?

M.L. Right.

G.P. Did Gary ever get out of the car?

M.L. Huh uh.

G.P. So Ben stopped, got out of the car, I guess he made whoever the other guy is, that we don't know his name, made him get out of the car?

M.L. **No Statement Made**

G.P. And you thought they was just gonna let him off and then take his car, is that what you thought?

M.L. That's what me and Gary both thought.

G.P. Did you hear an argument between these two or did they wrestle or fight or. . .

M.L. I didn't see no fight man, we had the windows rolled up and music blaring.

G.P. Could they, were they arguing or do you think this guy tried to run or, why do you think Ben would shoot him?

M.L. I don't know, don't know that.

G.P. So, you said Ben shot him, did you see the flash or how do you know Ben shot him, let me ask you that?

M.L. Well, he dropped.

G.P. How far was Ben from him?

M.L. It was about as far as from me to them dudes in there.

G.P. Which was about ten to fifteen feet, you think that's accurate?

M.L. I'd say ten to fifteen yards.

G.P. Ten to fifteen yards. Did anything transpire right before he shot him?

M.L. What do you mean?

G.P. I understand that when they found the body, he didn't have his clothes on. Do you remember anybody telling him to take his clothes off or why he wouldn't had his clothes on?

M.L. I don't know.

G.P. How long had ya'll been stopped before you heard the shots?

M.L. About five minutes maybe.

G.P. And then I guess Ben got back into the car?

M.L. Yeah.

G.P. What was said?

M.L. After he got back in the car?

G.P. **No Statement Made*

M.L. Nothing. I was wanting out, you know, I didn't say nothing to nobody.

G.P. You knew he had shot him?

M.L. Yeah.

G.P. You didn't ask "Why did shoot him?" Or did Gary ask him "Why did you shoot_him?"

M.L. No. Neither one of us said a word.

G.P. Did he offer any reason why he did shoot him?

M.L. Huh uh.

G.P. Up until that time, ya'll were the only four in the car? You, Ben and Gary and this guy?

M.L. Right.

G.P. Did you see anybody else there where ya'll stopped?

M.L. I wasn't really looking for anybody.

G.P. Okay. But apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben?

M.L. Yeah, something like that.

G.P. And then you heard, when they fired the shots, were they pow-pow or was there some time in between them?

M.L. Pow-pow, you know.

G.P. Pretty quick?

M.L. Yeah.

G.P. And then he got, did he get back in the car immediately or did he stay outside for awhile?

M.L. Well, he got in, he didn't waste too much time.

G.P. And then he was driving?

M.L. Yeah.

G.P. And then ya'll just pulled off and left?

M.L. Yeah.

G.P. Ya'll didn't check on the guy to see if he was dead or did Ben check on him and say he was dead?

M.L. It scared me man, I wanted to get the hell out of there.

G.P. No, but did Ben say "He's dead"?

M.L. Yeah.

G.P. Ben did say he was dead, so Ben walked back to him you think and checked him?

M.L. I don't know if he walked back but he must have knew something.

G.P. Would he have had enough time, from the time you heard the shots, to have walked back to him and then come back and got in the and drove off?

M.L. Do what now?

G.P. What I'm saying, you said he was about ten or fifteen yards away, would Ben had enough time to shoot him, walk over to him and check to see if he was dead and then come back and get in the car? You said there was a little time period in there from the time you heard the shots

until the time Ben got back into the car. And Ben knew he was dead, Ben told you he was dead. So, apparently Ben had checked him or for some reason thought he was dead.

M.L. Yeah, or he could'a stood there too.

G.P. Did Ben say where he shot him?

M.L. Huh uh. I didn't ask either.

G.P. So ya'll stayed in the car. You were still in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. What do you mean what happened after that?

G.P. Where did ya'll go after you pulled off and left the body and kept coming towards Giles County.

M.L. Well, we just went riding around drinking beer and liquor.

G.P. Okay.

M.L. We got, we stopped and bought us a case of beer somewhere.

G.P. Okay. Do you remember coming into the M & L or the H & L Mini Mart over, I can tell ya it's in the Eggleston area, I don't know if you know where that is. It's out in the country.

M.L. All of these places out in the country.

G.P. Well, these are even more country than most, but it's a little, bitty, country store. There was an old man and an old woman in it.

M.L. I think I remember something about it.

G.P. What do you remember? You know, here again you're being honest and the story matches, all I'm asking is just continue to be honest. What happened when ya'll stopped at that little country store where the old man and the old woman was running it?

M.L. Uh, well, we went in and first of all, they wanted to rob it and they figured that, Ben figured that he was in deep enough, you know, where he shot that mother fucker, you know. I guess he just thought I ain't got nothing to loose, I'll just rob this bitch (not understandable) money.

G.P. Okay. Who went in the store?

M.L. All of us.

G.P. Did any of you carry any weapons with you?

M.L. One of them had one, I didn't have none.

G.P. You didn't have any weapons with you?

M.L. Huh uh.

G.P. Do you know who carried the weapon in?

M.L. Huh uh, I don't know that.

G.P. What kind of weapon did they carry in?

M.L. Well, the pistol.

G.P. Okay. And what transpired when you got inside? How many people were in there other than ya'll?

M.L. Just the old man and woman.

G.P. Alright, when you got inside, where did you go?

M.L. I just walked, let's see, I think it the aisles like that. . .

G.P. Uh huh.

M.L. and that goes back to the beer. And they up here fucking around, and I go back there and get some beer. You know, and part of what went on, they had robbed this mother fucker, you know. And I just thought, "Hell, a twelve pack of beer ain't gonna hurt nothing." So I just took the beer, I took my twelve pack of beer.

G.P. Okay. You didn't pay for it, you just took it?

M.L. Right. I was so drunk, I don't do that shit, you know, if I'm sober. I had money in my pocket. I figured. .

G.P. Did ya'll, was any money taken from the store that you know of?

M.L. They got some.

G.P. Did you end up with any of it?

M.L. Three ways.

G.P. Okay. Ya'll split it evenly three ways. You know how much your share was?

M.L. It wasn't much man, about a hundred, under a hundred dollars.

G.P. Did ya'll fire any shots in to that store?

M.L. No.

G.P. No shots were fired there, no. . .

M.L. No.

G.P. was the man and woman hurt to your knowledge?

M.L. Not to my knowledge, no.

G.P. Okay. When you went in there, of course, Ben already told "Let's go in there and this store." So you all three went in there, one of them carried a gun, you don't whether it was Ben or whether it was Gary?

M.L. Right.

G.P. Did, what did Gary bring out of it?

M.L. Beer.

G.P. He had beer, did he have anything else?

M.L. I don't know.

G.P. What did Ben bring out?

M.L. I ain't for sure man.

G.P. Alright when ya'll split the money up a little later, who pulled the money out, who had the money?

M.L. It come from the back. This time I was riding up front.

G.P. Okay. So, when you left the store ya'll had a, who was driving when you left?

M.L. Gary.

G.P. Gary was driving and you were up front?

M.L. Yeah.

G.P. And then that would have put Ben in the back?

M.L. Yeah.

G.P. From once you robbed the store, all three of you got back in the vehicle, what did you do then?

M.L. When all three of us got back in the vehicle?

G.P. Uh huh.

M.L. We took off.

G.P. Okay. Did ya'll stop anywhere along the way after that, before you got to the next store?

M.L. Huh uh.

G.P. When did ya'll divide the money up? You said ya'll divided it three ways and it was about a hundred dollars all together.

M.L. Down at the sandbar.

G.P. Okay. That was, of course, that was obviously after you left the store, you already had the money. Then you said the money came from back, so it must have come from Ben, right?

M.L. **No Statement Made**

G.P. Is that a yes or a no?

M.L. Yeah.

G.P. Okay. So ya'll pulled in down around the sandbar, split the money, and then where did you go after that?

M.L. Over to the other store.

G.P. And when you say "to the other store" are you familiar with Pembroke?

M.L. **No Statement Made**

G.P. But you went to another convenient store type establishment?

M.L. Yeah, across from Dairy Queen.

G.P. Okay. Who went in the store there?

M.L. Me and Gary.

G.P. And where was Ben on that one?

M.L. Driving.

G.P. Ben was driving?

M.L. **No Statement Made**

G.P. Did you carry a weapon in with you. . .

M.L. Huh uh.

G.P. when you went in the store? Did Gary carry a weapon in?

M.L. Yeah, Gary had one.

G.P. What did he carry in with him?

M.L. A pistol.

G.P. Okay. You stopped there apparently if you went in with a pistol and all you stopped there to rob that store, is that right?

M.L. We stopped there for something, I don't know.

G.P. Did ya'll discuss it before you went in, say "Ben you stay here and we're gonna go in and rob this" or what was the discussion?

M.L. We was all so drunk.

G.P. Okay. But you remember you went in, Gary went in, he had the pistol and Ben stayed in the car. What happened once you got inside?

M.L. Well. . .

G.P. Who went to the clerk, who talked to the clerk?

M.L. Gary.

G.P. Okay. And do you know what Gary asked her or told her?

M.L. No, she, but it must have been funny cause she was laughing, she wouldn't stop laughing.

G.P. Okay. Did Gary show her the gun?

M.L. Yeah.

G.P. And tell her this was a robbery?

M.L. Yeah.

G.P. And she was laughing?

M.L. **No Statement Made**

G.P. Okay. What happened, transpired at that time?

M.L. Some old man from outside come in and seen what taking and he tried taking the gun from Gary.

G.P. Uh huh. And then what happened?

M.L. Well, they got their stuff, we got broke up and we left.

G.P. Ya'll jumped back in the car?

M.L. Yeah.

G.P. Where did you get into, front or back?

M.L. I don't even remember, man. Back maybe.

G.P. Okay. And then you drove off?

M.L. Yeah.

G.P. What happened as you drove off?

M.L. Nothing really.

G.P. Do you recall someone firing a shot out the window because someone was following you?

M.L. Yeah.

G.P. Who fired the shot out the window?

M.L. I don't know. I don't know who fired the shot.

G.P. Alright. If Ben was driving, Gary was in the front seat and you were in the back, did you fire the shot?

M.L. I don't even know if I was in the back. I could have been in the front.

G.P. Okay.

M.L. I don't know.

G.P. Gary could have been in the back.

M.L. Yeah.

G.P. We know Ben was driving.

M.L. Yeah.

G.P. Well, did you fire the gun?

M.L. Huh uh.

G.P. Which gun was fired?

M.L. I don't know.

G.P. But you remember hearing a shot, but you don't know whether Ben or Gary fired it?

M.L. Right.

G.P. And then what happened shortly after that?

M.L. We lost 'em.

G.P. Okay. So you know the reason the gun was fired was cause someone was following you very closely?

M.L. Yeah.

G.P. Did they fire the gun at the car that was following you or just shooting it up in the air?

M.L. I don't know.

G.P. Okay. Do you remember what happened when your vehicle stopped?

M.L. **No Statement Made**

G.P. How come ya'll to stop and leave your car?

M.L. It blowed up.

G.P. Just stopped running with you?

M.L. Yeah.

G.P. What did ya'll attempt to do then?

M.L. Walk.

G.P. And then is that when the police showed up?

M.L. Uh huh.

G.P. What did Ben do when the police showed up?

M.L. I wasn't around, I don't know.

G.P. What did you do?

M.L. I was already gone.

G.P. Where did you go?

M.L. Running down the road.

G.P. Did you go into the wooded area at all?

M.L. **No Statement Made**

G.P. Was, that's a yes, is that right? You did go into the wooded area some?

M.L. **No Statement Made**

G.P. Where did Gary go?

M.L. I don't know, I lost him.

G.P. What did you carry with you when you left the car and took off running?

M.L. I didn't have nothing.

G.P. Was you carrying the pistol with you?

M.L. I didn't have shit man.

G.P. You didn't have the pistol with you. My understanding was you did have a pistol and I may be wrong.

M.L. No.

G.P. You didn't have the pistol?

M.L. Huh uh.

G.P. You didn't take any guns or anything with you when you ran?

M.L. Huh uh.

G.P. Okay.

M.L. Just spur of the moment man, I seen the law and I was gone.

G.P. And where were you picked up?

M.L. Huh?

G.P. Where were you picked up? Did the police pick you up?

M.L. Up there where that dude rents canoes on 460.

G.P. How did you get up there? Did you walk all the way, or run?

M.L. Jog.

G.P. Didn't get a ride or anything, jog all the way up there?

M.L. **No Statement Made**

G.P. Everything you told me is true, to the best of your recollection?

M.L. Yeah.

G.P. Okay. Take a break there and I'll be right back. Did you drink all that? I'll get you some more water here in a minute.

M.L. Alright.

G.P. What did you tell the police your name was?

M.L. Michael Raider.

G.P. Michael Raider? Why did you do that for?

M.L. I just did.

G.P. Is there a Michael Raider, do you know one?

M.L. Yeah.

G.P. How many people was with ya'll tonight? Not counting the guy that got shot?

M.L. Just me, Ben and Gary.

G.P. There never was a forth person then?

M.L. Huh uh.

G.P. Okay. Anything you wanna ask me?

M.L. Huh uh.

G.P. You, go ahead. . .

M.L. What all are you going to try and charge me for?

G.P. Well, here in Giles County, by your own admission and by statements of others, plus you'll be identified by the store owners and things, you'll be charged with two counts of armed robbery. And you'll be charged with using a fire arm in the commission of a felony. That doesn't necessarily mean that you had the gun on you, but a gun was used in the commission of a felony in that armed robbery. That's the things that I'll charge you with. Naturally, Blacksburg and Montgomery County and Floyd County officials are gonna be talking to you about what happened in their county. At any time today, have you fired a weapon at all?

M.L. Yeah.

G.P. Where did you fire a weapon?

M.L. I don't remember where it was at, but I did.

G.P. Do you remember what you shot at?

M.L. A beer can.

G.P. What, which weapon did you use?

M.L. A pistol.

G.P. Okay. My evidence tech, in a few minutes, I'll ask your permission to take a gun shot residue which is a little thing that they dab on you to collect any gun powder that's on you. If you say you shot the gun, then he'll probably find some, but he'll still do it as something that we have to do. He'll ask you permission to do it, so.

M.L. Yeah.

G.P. If you have no more questions of me, I will end the interview at 2:12 AM.

Transcribed by:

Christy Cumbee

Q. All right. And for those of us who don't know that much about Pembroke, is there a Dairy Queen near the M & W Mark, Market?

A. It's directly across from the Dairy Queen.

Q. Same side of the street?

A. No, sir, opposite side.

Q. Okay. And that was the only time you spoke with Mr. Mark Lilly about these incidents?

A. That's correct.

Q. Thank you. Answer any questions the defense may have, please.

THE COURT: Mr. Tuck.

CROSS-EXAMINATION

BY MR. TUCK:

Q. I'm going to draw your attention to page, well, I think they need to collect the transcripts first, but I'm going to draw your attention to Page 4 of the transcripts. I believe that Page 4, you ask a long question at the bottom of that, when did you, ah, and your brother and Ben and Gary, when did y'all get together today? And I believe Mark Lilly's response and

correct me if I'm wrong was, we'd been together a few days, well, me and Gary has, that's my brother's buddy. We all run around together. And it's his brother's buddy, is that correct? Is that what he said?

A. I'm, I'm still looking, sir.

Q. Okay. Page 4, center.

A. Okay.

Q. Now, he would later give you indications that he and Gary Barker were in fact living together, is that correct? He said that it was his brother's buddy, but later on he gave you indications that he, he being Mark Lilly, and Gary Barker were living together, is that correct, in Merrimac?

A. Yeah, I later learned that. I'm not sure exactly who furnished me that information.

Q. You didn't learn that information from Mark?

A. I may have. I just don't recall without refreshing my memory.

Q. Now, Page 5, I believe you were asking him about the, where they got the liquor at and I believe you

LT. R.L. HAMLIN: THIS IS LT. RON HAMLIN. MONTGOMERY COUNTY SHERIFF'S OFFICE. TODAY'S DATE IS DECEMBER 6, 1995. TIME IS 2:30 A.M. PRESENT DURING THIS INTERVIEW WILL BE INVESTIGATOR BOB FLEET, MONTGOMERY COUNTY SHERIFF'S OFFICE. WE'LL BE TALKING TO MARK LILLY, WHO LIVES IN RIVER. FIRST OFF, I'M GOING TO ADVISE MR. LILLY OF HIS MIRANDA RIGHTS. YOU HAVE THE RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AS EVIDENCE IN A COURT OF LAW. YOU HAVE THE RIGHT TO TALK TO A LAWYER, AND HAVE HIM PRESENT WITH YOU WHILE YOU'RE BEING QUESTIONED. IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING, IF YOU WISH. IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. DO YOU UNDERSTAND WHAT I JUST TOLD YOU?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: YOU DO UNDERSTAND?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY, WOULD YOU SIGN RIGHT HERE, PLEASE?

(PAUSE)

LT. R.L. HAMLIN: OKAY, MARK, WE UNDERSTAND SOME THINGS HAPPENED TODAY. WELL, IT'S PASSED, IT'S YESTERDAY NOW, ON 12/5. WE NEED TO TALK TO YOU ABOUT WHAT'S HAPPENED YESTERDAY AND LED UP TO WHY WHAT WE'RE HERE RIGHT NOW AT 2:30 IN THE MORNING, OKAY?

MARK A. LILLY: ALL RIGHT.

LT. R.L. HAMLIN: IF YOU WOULD, LET'S TALK ABOUT HOW DID YESTERDAY START OFF?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: SIR?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: YOU WERE DRUNK YESTERDAY?

MARK A. LILLY: YEAH. DRUNK AS I EVER BEEN. WE PARTIED ALL NIGHT THE NIGHT BEFORE.

LT. R.L. HAMLIN: WHAT'S YOUR MIDDLE NAME?

MARK A. LILLY: ANTHONY.

LT. R.L. HAMLIN: OKAY, WHO WERE YOU WITH YESTERDAY?

MARK A. LILLY: BEN AND GARY BARKER. BEN LILLY AND GARY BARKER.

LT. R.L. HAMLIN: WHERE DID YALL GET TOGETHER AT?

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: COME HERE AND SPEAK UP. I'VE GOT TO GET THIS.

MARK A. LILLY: BEN COME OVER TO THE TRAILER ABOUT 9 OR 10 IN THE MORNING. WE WAS STILL IN THE BED.

LT. R.L. HAMLIN: BEN CAME TO YALL'S TRAILER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: "YALL" IS BEN?

MARK A. LILLY: DO WHAT?

LT. R.L. HAMLIN: BEN IS YOUR BROTHER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHERE'S THAT AT, WHERE DO YOU LIVE AT?

MARK A. LILLY: HOLLY COURT TRAILER PARK.

LT. R.L. HAMLIN: BEN LIVE THERE, OR IS THAT HIS PLACE OR YOURS?

MARK A. LILLY: NAH, IT'S JUST A PLACE ME AND GARY GO PARTYING. (INAUDIBLE)

LT. R.L. HAMLIN: HANG OUT SPOT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THAT'S YOU AND UH, BEN. WHAT DID YALL DO FROM THERE?

MARK A. LILLY: STARTED DRINKING.

LT. R.L. HAMLIN: STARTED DRINKING?

MARK A. LILLY: YEAH. WE ALWAYS GET SOMETHING TO DRINK.

LT. R.L. HAMLIN: THEN WHAT ELSE DID YOU GET IN TO?

MARK A. LILLY: WENT TO FLOYD COUNTY.

LT. R.L. HAMLIN: ABOUT WHAT TIME?

MARK A. LILLY: IT WAS DARK.

LT. R.L. HAMLIN: IT WAS DARK?

MARK A. LILLY: YEAH. IT WAS, DRANK BEER, LIQUOR ALL DAY.

LT. R.L. HAMLIN: ABOUT WHAT TIME DID YOU GO TO FLOYD THEN, ABOUT FIVE? OR A LITTLE AFTER, FIVE-THIRTY?

MARK A. LILLY: YEAH, GIVE OR TAKE.

LT. R.L. HAMLIN: ALL RIGHT, WHAT DID YOU GO TO FLOYD FOR?

MARK A. LILLY: WE BROKE INTO A PLACE.

LT. R.L. HAMLIN: BREAK INTO A PLACE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHOSE PLACE WAS IT?

MARK A. LILLY: I DON'T KNOW. I DON'T, I BARELY EVEN REMEMBER IT.

LT. R.L. HAMLIN: WAS IT A HOUSE OR A STORE?

MARK A. LILLY: A HOUSE.

LT. R.L. HAMLIN: ALL RIGHT, HOW DID YOU GET OVER TO FLOYD?

MARK A. LILLY: UH, THE COUGAR, MERCURY COUGAR.

LT. R.L. HAMLIN: WHOSE CAR IS THAT?

MARK A. LILLY: IT'S BEN'S.

LT. R.L. HAMLIN: WHO WAS DRIVING?

MARK A. LILLY: UH, I DON'T KNOW.

LT. R.L. HAMLIN: YOU DON'T REMEMBER WHO WAS DRIVING?

MARK A. LILLY: NO, I ALWAYS RIDE IN THE BACK.

LT. R.L. HAMLIN: DID THAT CAR BELONG TO BEN?

MARK A. LILLY: UH-HUH.

LT. R.L. HAMLIN: YOU REMEMBER BREAKING INTO THE HOUSE?

MARK A. LILLY: NOT REALLY, NO.

LT. R.L. HAMLIN: DO YOU KNOW WHO BROKE IN? DID YOU GO INSIDE THE HOUSE?

MARK A. LILLY: UH, I GUESS.

LT. R.L. HAMLIN: YOU WENT INSIDE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL OF YOU GO IN?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT DID YOU TAKE FROM THE HOUSE?

MARK A. LILLY: LIQUOR.

LT. R.L. HAMLIN: WHAT ELSE?

MARK A. LILLY: GUNS.

LT. R.L. HAMLIN: GUNS? WHAT KIND OF GUNS?

MARK A. LILLY: UH, THREE. A PISTOL AND SOME RIFLES.

LT. R.L. HAMLIN: TOOK ONE PISTOL? AND A RIFLE?

INV. R.F. FLEET: TWO RIFLES.

LT. R.L. HAMLIN: TWO RIFLES? THAT IT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND LIQUOR.

MARK A. LILLY: AND LIQUOR.

INV. R.F. FLEET: ANYTHING ELSE YOU CAN THINK OF?

MARK A. LILLY: NOT THAT I CAN THINK OF. I WAS SO DRUNK. I WAS DRUNK WHEN YOU BROUGHT ME IN HERE AT 1:30 THIS MORNING.

INV. R.F. FLEET: HOW YOU FEEL NOW?

LT. R.L. HAMLIN: WAS IT.....

MARK A. LILLY: I FEEL ALL RIGHT.

INV. R.F. FLEET: YOU'RE ALL RIGHT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU KNOW WHERE YOU'RE AT?

MARK A. LILLY: YEAH, I'M IN JAIL.

INV. R.F. FLEET: WHERE AT?

MARK A. LILLY: IN GILES COUNTY.

LT. R.L. HAMLIN: OKAY, ONCE YOU LEFT FLOYD WHERE DID YOU GO?

MARK A. LILLY: I DON'T EVEN REMEMBER. (INAUDIBLE)

LT. R.L. HAMLIN: YOU CAME STRAIGHT....YOU DON'T REMEMBER COMING BACK FROM FLOYD? WHAT DO YOU REMEMBER NEXT? COME OVER HERE AND TALK.

MARK A. LILLY: DRUNK AS SHIT. THAT'S ALL I REMEMBER.

INV. R.F. FLEET: TELL US ABOUT WHAT HAPPENED AFTER YOU LEFT FLOYD, MARK.

LT. R.L. HAMLIN: WHEN YOU COME BACK TO MONTGOMERY COUNTY, WHAT DO YOU REMEMBER?

MARK A. LILLY: WE WENT BACK TO THE TRAILER AND DRANK SOME MORE LIQUOR.

INV. R.F. FLEET: THEN WHERE DID YOU GO?

MARK A. LILLY: UH, WENT TO GILES COUNTY FOR SOMETHING.

INV. R.F. FLEET: OKAY, AND WHAT HAPPENED THEN?

MARK A. LILLY: WE WERE IN SOMEWHERE OVER IN BLACKSBURG, THE CAR BROKE DOWN AND THE DUDE GOT ANOTHER CAR.

LT. R.L. HAMLIN: (INAUDIBLE)

INV. R.F. FLEET: TELL US ABOUT HOW THE DUDE GOT ANOTHER CAR.

MARK A. LILLY: PULLED OUT A GUN.

INV. R.F. FLEET: WHO WAS THE DUDE?

MARK A. LILLY: MY BROTHER.

LT. R.L. HAMLIN: ALL RIGHT, WHERE DID THIS HAPPEN AT?

MARK A. LILLY: STORE NEAR PRICE'S FORK (INAUDIBLE)

LT. R.L. HAMLIN: AND HOW COME HIM TO DO THAT?

MARK A. LILLY: DIDN'T WANT TO WALK I GUESS. (INAUDIBLE)

LT. R.L. HAMLIN: WHAT DID, WHAT HAPPENED TO THE COUGAR?

MARK A. LILLY: IT BROKE DOWN, MAN, THE BATTERY WENT DEAD. OH. YEAH, THE FUCKING TRANSMISSION WENT OUT.

LT. R.L. HAMLIN: ALL RIGHT, WHEN BEN, WHEN BEN PULLED THE GUN ON THE DUDE, WHERE WERE YOU AT?

MARK A. LILLY: STILL IN THE COUGAR.

LT. R.L. HAMLIN: YOU WERE STILL IN THE COUGAR? WHERE WAS GARY BARKER AT?

MARK A. LILLY: HE WAS STANDING BESIDE THE COUGAR.

LT. R.L. HAMLIN: YOU AND GARY WERE AT THE COUGAR?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL RIGHT, WHAT HAPPENED THEN? WHAT DID YALL SEE HAPPEN?

MARK A. LILLY: WELL, BEN JUST TOLD US TO COME ON.

LT. R.L. HAMLIN: SO YALL WENT OVER THERE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: BEN TOLD YALL TO COME ON?

MARK A. LILLY: YEAH. WE WAS DRUNK MAN.

INV. R.F. FLEET: WHAT HAPPENED TO THE DUDE THAT OWNED THE CAR?

MARK A. LILLY: BEN SHOT HIM.

LT. R.L. HAMLIN: NO...

INV. R.F. FLEET: NOT YET.

LT. R.L. HAMLIN: WE'RE TALKING ABOUT AT THE STORE. NOW.

MARK A. LILLY: OH.

LT. R.L. HAMLIN: AT THE STORE WHEN BEN TOLD YALL TO COME ON, WHAT, WHAT HAPPENED TO THE BOY YOU TOOK THE CAR? THAT WAS DRIVING THE CAR, WHAT HAPPENED TO HIM?

INV. R.F. FLEET: I KNOW IT'S TOUGH, WE'RE JUST TRYING TO FOLLOW WHAT HAPPENED AT EACH PLACE. AND WE KNOW WHAT HAPPENED TO THE BOY.

MARK A. LILLY: YEAH. YEAH, MAN, SOMETHING ELSE, TOO. I'M GOING TO BE GETTING ALL THESE CHARGES AND THAT'S MY BROTHER I'M TELLING ON.

INV. R.F. FLEET: I KNOW THAT.

LT. R.L. HAMLIN: YEP.

INV. R.F. FLEET: YOU DIDN'T PULL THE TRIGGER, THOUGH.

MARK A. LILLY: I DIDN'T.

INV. R.F. FLEET: YOU DON'T NEED TO TAKE THE WRAP.

LT. R.L. HAMLIN: THAT'S RIGHT.

MARK A. LILLY: I KNOW, THEY'RE GONNA SEND ME TO THE PENITENTIARY ANYWAY (INAUDIBLE) GRAND JURY (INAUDIBLE) THEY GOT ME FOR ARMED ROBBERY. I KNOW YALL ARE GONNA BRING UP SOME KIND OF MURDER CHARGE.

INV. R.F. FLEET: THAT'S WHY WE'RE TALKING TO YOU. WE'RE TRYING TO HELP YOU RIGHT NOW, TRYING TO GET, YOU KNOW, TO FIND OUT WHO SHOT THIS BOY. NOW WE KNOW THAT YALL WERE THERE AND BEN PULLED THE GUN ON THIS GUY. AND YALL GOT IN THE CAR AND WENT DOWN TOWARDS MCCOY.

LT. R.L. HAMLIN: DID YOU, WHO MADE THE BOY GET IN THE CAR? DID YOU DO IT?

MARK A. LILLY: NO.

INV. R.F. FLEET: WHO DID?

LT. R.L. HAMLIN: WHO PUT THE GUN ON THE BOY AND MADE HIM GET IN THE CAR?

INV. R.F. FLEET: TELL THE TRUTH, MARK, FOR GOODNESS SAKES. WE'RE THE ONLY PEOPLE THAT ARE GOING TO HEAR RIGHT NOW AND THE ONLY PEOPLE GOING TO DO ANYTHING TO HELP YOU. NOW TELL THE TRUTH.

MARK A. LILLY: IT WAS BEN.

LT. R.L. HAMLIN: WHAT DID BEN TELL HIM?

MARK A. LILLY: I DON'T REALLY KNOW.

INV. R.F. FLEET: WHAT KIND OF GUN DID BEN HAVE?

MARK A. LILLY: PISTOL.

LT. R.L. HAMLIN: POINTED THE PISTOL AT HIM? WHAT DID THEY, WHERE WERE THE RIFLE AND SHOTGUN AT THAT TIME?

MARK A. LILLY: I DON'T EVEN KNOW. I WASN'T WORRIED ABOUT NO GUN I WAS DRUNK, THE ONLY THING I KEEP UP WITH MAN IS THE BEER.

INV. R.F. FLEET: THAT'S A GOOD THING TO KEEP UP WITH.

MARK A. LILLY: I AIN'T TRYING TO BE SMART. I DRINK ALL THE TIME.

LT. R.L. HAMLIN: ALL RIGHT, SO YALL LEFT THE STORE. THEN...

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: BACK TOWARDS....PRICE'S FORK?

MARK A. LILLY: I DON'T KNOW. LET ME ASK YALL A QUESTION, WHERE WAS THE BODY FOUND?

INV. R.F. FLEET: WHERE WAS WHAT?

MARK A. LILLY: THE BODY FOUND?

LT. R.L. HAMLIN: WE FOUND HIM IN WHITETHORNE.

INV. R.F. FLEET: WHITETHORNE.

MARK A. LILLY: WHITETHORNE?

LT. R.L. HAMLIN: OUT PRICE'S FORK.

INV. R.F. FLEET: YOU KNOW WHERE THE BOAT LANDING IS AT WHITETHORNE?

MARK A. LILLY: I DON'T KNOW.

INV. R.F. FLEET: YOU KNOW WHERE THE RAILROAD TRACKS? REMEMBER RAILROAD TRACKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: IS THAT WHERE YALL WENT? TOWARDS THE RAILROAD TRACKS?

MARK A. LILLY: BUDDY, I CAN'T EVEN THINK. I DON'T KNOW.

LT. R.L. HAMLIN: SO YALL, WHERE WAS THE GUY SEATED AT WHEN YOU LEFT?

MARK A. LILLY: IN THE BACK SEAT BESIDE THE WINDOW.

LT. R.L. HAMLIN: WHAT WAS HE SAYING?

MARK A. LILLY: NOTHING.

INV. R.F. FLEET: WAS HE SCARED?

MARK A. LILLY: HE DIDN'T REALLY ACT IT, YOU KNOW.

LT. R.L. HAMLIN: WERE YALL HAVING A CONVERSATION, WAS BEN AND UH, MARK, NOT MARK, BEN AND GARY TALKING? WERE YOU TALKING?

MARK A. LILLY: NO, NOBODY TALKED.

LT. R.L. HAMLIN: NOBODY SAID A WORD? AND BEN DROVE THE CAR?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: OKAY, SO YOU END UP IN AN ISOLATED SPOT OUT IN THE COUNTY SOMEWHERE. THAT'S ALL YOU REMEMBER, RIGHT? YOU WITH ME? YES OR NO?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: SO YOU GO TO AN ISOLATED SECTION OF THE COUNTY. WHAT DO YOU REMEMBER ABOUT THE ISOLATED SECTION THAT WE'RE TALKING ABOUT? WHEN YALL STOPPED WITH THE GUY?

MARK A. LILLY: BIG OLD TANKS.

LT. R.L. HAMLIN: BIG TANKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT ELSE DO YOU RECALL?

MARK A. LILLY: THAT'S ABOUT IT.

LT. R.L. HAMLIN: REAL DARK?

MARK A. LILLY: YEAH, IT WAS DARK.

LT. R.L. HAMLIN: YOU REMEMBER RAILROAD TRACKS. BRIDGES?

MARK A. LILLY: SOMETHING LIKE THAT.

LT. R.L. HAMLIN: OH, WELL, WE'RE TRYING TO HELP YOU, WE'RE NOT TRYING TO LEAD YOU INTO ANYTHING.

MARK A. LILLY: I WASN'T DRUNK ENOUGH, YOU KNOW, I KNOW THAT I DIDN'T PULL NO DAMN TRIGGER. (INAUDIBLE)

LT. R.L. HAMLIN: OKAY.

INV. R.F. FLEET: OKAY, THAT'S GOOD. THAT'S GOOD.

LT. R.L. HAMLIN: ALL RIGHT...

INV. R.F. FLEET: YOU REMEMBER RAILROAD TRACKS? YOU SAID THAT RINGS A BELL.

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: YOU REMEMBER A PILE OF JUNK OR ANYTHING LIKE THAT, WHAT ELSE?

MARK A. LILLY: I WASN'T PAYING ATTENTION.

INV. R.F. FLEET: A FIELD? A BIG, OLE CORN FIELD, LIKE?

LT. R.L. HAMLIN: YEAH, A BIG, OLE FIELD THERE BEHIND IT.

INV. R.F. FLEET: IT'S SORT OF ISOLATED, RIGHT? WASN'T ANYTHING REALLY AROUND? JUST LIKE A BIG GRAVEL LOT, WASN'T IT? IS THAT WHAT IT WAS? REMEMBER THAT?

LT. R.L. HAMLIN: DID YOU GET OUT OF THE CAR?

MARK A. LILLY: I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU NEVER DID GET OUT OF THE CAR?

INV. R.F. FLEET: WHERE WERE YOU SITTING?

MARK A. LILLY: I WAS SITTING IN THE PASSENGER. BEHIND THE PASSENGER SEAT. I NEVER GOT OUT OF THE CAR.

LT. R.L. HAMLIN: DID GARY GET OUT OF THE CAR?

MARK A. LILLY: NUH-HUH.

LT. R.L. HAMLIN: THE ONLY TWO PEOPLE THAT GOT OUT WAS BEN...

MARK A. LILLY: AND THE DUDE.

LT. R.L. HAMLIN: WHAT DID, HOW DID YALL GET HIM OUT? DID BEN JUST SAY COME ON, GET OUT?

MARK A. LILLY: YEAH. JUST LIKE THAT.

LT. R.L. HAMLIN: AND THE GUY GOT OUT.

MARK A. LILLY: YEAH.

INV. R.F. FLEET: AND THEN WHAT?

MARK A. LILLY: AND THAT'S WHEN BEN SHOT HIM.

LT. R.L. HAMLIN: WHAT KIND OF WEAPON DID BEN HAVE THEN?

MARK A. LILLY: THE PISTOL.

INV. R.F. FLEET: (INAUDIBLE) WHAT DO YOU MEAN?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: AND WHO HAD THE GUN?

MARK A. LILLY: BEN.

LT. R.L. HAMLIN: BEN?

INV. R.F. FLEET: AND WHAT KIND OF GUN WAS IT?

MARK A. LILLY: .38.

INV. R.F. FLEET: AND WHERE WERE YOU SITTING AT, OR WHERE WERE YOU AT?

MARK A. LILLY: I WAS STILL IN THE CAR.

INV. R.F. FLEET: DID YOU SEE THE SHOT?

MARK A. LILLY: I SAW HIM FIRE.

INV. R.F. FLEET: DID YOU KNOW WHAT HAPPENED?

MARK A. LILLY: YEAH. I DIDN'T KNOW WHAT TO THINK, MAN.

LT. R.L. HAMLIN: WHEN, AT WHAT POINT DID YOU TAKE THE CLOTHES OFF OF THE GUY? DO YOU REMEMBER THAT?

MARK A. LILLY: I GUESS THEY TOOK THEM OFF WHEN THEY WAS OUTSIDE FUCKING AROUND.

LT. R.L. HAMLIN: BEN TELL HIM TO TAKE HIS CLOTHES OFF, YOU REMEMBER THAT?

MARK A. LILLY: I COULDN'T HEAR WHAT THEY WERE SAYING.

LT. R.L. HAMLIN: DID YOU SEE THE GUY TAKING HIS CLOTHES OFF THOUGH? DID YOU SEE ANYTHING?

MARK A. LILLY: I SEEN THE DUDE TAKING HIS SHIRT OFF, SHOES.

LT. R.L. HAMLIN: THE DUDE WAS TAKING HIS SHIRT AND PANTS AND STUFF OFF? AND WHAT WAS BEN SAYING?

MARK A. LILLY: I DON'T KNOW. YOU KNOW WE HAD THE MUSIC BLAIRING. IT WAS PRETTY COLD OUTSIDE, THE WINDOWS WERE UP.

LT. R.L. HAMLIN: ALL RIGHT. DID BEN GET BACK IN THE CAR, WAS HE GOING TO DRIVE OFF AND LEAVE THE GUY THERE TO WALK AWAY? DID BEN TELL HIM THAT HE WAS GOING TO LEAVE HIM THERE OR DID THEY JUST STAY OUTSIDE THE WHOLE TIME AND THEN BANG, BANG? AND THAT WAS IT?

MARK A. LILLY: THAT'S PRETTY MUCH IT.

LT. R.L. HAMLIN: BEN NEVER GOT BACK IN THE CAR UNTIL AFTER THE SHOOTING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: HE DIDN'T GET IN THE CAR AND START TO DRIVE OFF AND SAY 'OH, I FORGOT, HE KNOWS ME NOW, HE'S SEEN ME' AND STOP THE CAR AND GOT OUT?

MARK A. LILLY: NO, MAN.

LT. R.L. HAMLIN: THE WHOLE TIME, WHEN BEN STOPPED THE CAR AND GOT THE GUY OUT, BEN NEVER GOT BACK IN THE CAR? HE SHOT HIM BEFORE HE GOT BACK IN WITH YOU, IS THAT CORRECT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY. DID YALL LEAVE THERE PRETTY QUICK? DID YOU SPIN GRAVEL AND TAKE OFF?

MARK A. LILLY: WE LEFT TOWN PRETTY QUICK, YEAH.

LT. R.L. HAMLIN: HOW MANY TIMES DO YOU THINK HE SHOT HIM? COULD YOU HEAR SHOTS?

MARK A. LILLY: A COUPLE.

LT. R.L. HAMLIN: A COUPLE OF SHOTS.

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: THEN YALL LEFT MCCOY. WHICH WAY DID YOU GO THEN? YOU COME TO GILES.

MARK A. LILLY: WE WENT TO GILES, WE WAS GOING OUT SOME BACK ROAD.

LT. R.L. HAMLIN: OUT THE BACK ROAD?

MARK A. LILLY: YEAH, THROUGH THAT LONG. STRAIGHT STRETCH ABOUT THE CURVE.

LT. R.L. HAMLIN: OKAY, NOW, AFTER SEEING SOMETHING LIKE THAT, YOU AND CARY, AFTER THIS HAPPENED, WHAT WAS SAID AFTER BEN GOT BACK IN THE CAR? WHAT DID YALL TALK ABOUT?

MARK A. LILLY: NOTHING. I COULDN'T FIGURE IT OUT. I LIKE TO SHIT IN MY PANTS.

LT. R.L. HAMLIN: YALL DIDN'T TALK ABOUT ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: DID BEN SAY ANYTHING ABOUT SHOOTING HIM? BEN SAY 'WELL, I CAPPED HIM'? DID HE SAY ANYTHING?

MARK A. LILLY: WE WAS ALL STUNNED.

LT. R.L. HAMLIN: BEN WASN'T STUNNED WAS HE?

MARK A. LILLY: I DON'T KNOW IF HE WAS OR NOT. HE DIDN'T SAY MUCH. I KNOW GARY WAS.

LT. R.L. HAMLIN: YEAH.

MARK A. LILLY: I KNOW HE AIN'T SEEN NOTHING LIKE AND I HADN'T EITHER.

LT. R.L. HAMLIN: YALL HAVE NEVER SEEN NOTHING LIKE THAT HAD YOU?

MARK A. LILLY: NO.

INV. R.F. FLEET: YALL DIDN'T TALK AND BEN DIDN'T SAY ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: YOU BOUND TO HAVE TALKED ABOUT SOMETHING. MAN.

INV. R.F. FLEET: HE SHOT THIS GUY AND NEVER SAID A WORD?

MARK A. LILLY: NOT THAT I KNOW OF. MAINLY TALKED AMONG EACH OTHER.

LT. R.L. HAMLIN: BEN WAS DOING THE DRIVING STILL YET?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: (INAUDIBLE)

LT. R.L. HAMLIN: SO YOU COME TO GILES COUNTY. WHO COME UP WITH THE IDEA LET'S UH, WE KNOW YOU ROBBED A COUPLE OF STORES OVER HERE, RIGHT?

INV. R.F. FLEET: STUCK UP A COUPLE OF PLACES. REMEMBER THAT?

MARK A. LILLY: I WAS WITH THE PEOPLE THAT DID IT.

INV. R.F. FLEET: REMEMBER THAT?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: GARY AND BEN.

LT. R.L. HAMLIN: YEAH, OKAY. WHAT, WHEN WAS THAT DECISION MADE? WAS THAT MADE ON THE WAY TO GILES? LET'S GO OVER TO GILES? WHEN YALL GOING TO ROB STORES AND LEAVE THIS AREA OR....?

MARK A. LILLY: I DON'T KNOW, MAN, IT JUST ALL HAPPENED, LIKE THAT, BAM, BAM. THE ROBBERY JUST HAPPENED LIKE THAT.

INV. R.F. FLEET: WHOSE IDEA WAS THAT?

LT. R.L. HAMLIN: YEAH, WHO COME UP WITH THAT?

MARK A. LILLY: I DON'T KNOW.

LT. R.L. HAMLIN: DID YALL NEED SOME MONEY?

MARK A. LILLY: WE WAS BROKE.

LT. R.L. HAMLIN: YOU WERE BROKE.

MARK A. LILLY: YEAH. (INAUDIBLE)

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OFF OF THE GUY THAT YOU LEFT OVER THERE IN MONTGOMERY? DID HE HAVE ANY MONEY ON HIM?

MARK A. LILLY: I DON'T KNOW THAT.

LT. R.L. HAMLIN: ALL YOU KNOW IS YOU TOOK THE CLOTHES. TAKE HIS WATCH OR ANYTHING?

MARK A. LILLY: I DON'T KNOW NOTHING ABOUT THAT SHIT, MAN. I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU DON'T KNOW. OKAY. SO YOU COME TO GILES AND THEN EVERYTHING JUST CLICKED AND A COUPLE OF PLACES OVER HERE.

MARK A. LILLY: YEAH, IT JUST ALL HAPPENED QUICK. THEY WAS DRUNKER THAN HELL, TOO.

LT. R.L. HAMLIN: SO. THEN THE NEXT THING YOU KNOW YOU'RE CAUGHT AND BROUGHT INTO THE SHERIFF'S OFFICE?

MARK A. LILLY: YEAH. I WAS WALKING UP 430. NEVER SEEN SO GODDAMN MANY LAW IN MY LIFE.

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OUT OF THESE STORES YOU WERE ROBBING OVER HERE?

MARK A. LILLY: A FEW DOLLARS. BOTH THEM MOTHER-FUCKERS ARE BROKE AS IT WAS.

LT. R.L. HAMLIN: SO AFTER YOU ROBBED THIS SECOND PLACE THE NEXT THING YOU KNOW IS YOU WERE APPREHENDED BY GILES COUNTY. IS THAT RIGHT?

MARK A. LILLY: YEAH (INAUDIBLE)

LT. R.L. HAMLIN: YOU WERE DRUNK AND TRYING TO RUN AWAY AND THEY CAUGHT YOU, HUH?

MARK A. LILLY: THEY DIDN'T CATCH ME RUNNING.

LT. R.L. HAMLIN: ANYTHING ELSE?

INV. R.F. FLEET: I WANT TO GO BACK, MARK. TO RIGHT AFTER THE SHOTS WERE FIRED. YOU WERE IN THE CAR, BEHIND THE PASSENGER SEAT. WHO WAS IN THE FRONT SEAT?

MARK A. LILLY: GARY.

INV. R.F. FLEET: YALL HEARD AND SAW A COUPLE OF SHOTS. MUSIC WAS PLAYING. BEN COMES AND GETS BACK IN THE CAR AND YALL TAKE OFF. GARY, UH, GARY DIDN'T SAY ANYTHING?

MARK A. LILLY: NO, ME AND GARY SAYS 'GODDAMN'. MOTHER-FUCKER SHOT HIM.

LT. R.L. HAMLIN: SAID WHAT?

MARK A. LILLY: SAID 'GODDAMN.'

LT. R.L. HAMLIN: BOTH OF YOU DID?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THEN BEN JUMPS IN AND DOWN THE ROAD YOU TAKE OFF.

INV. R.F. FLEET: AND WHAT DID BEN SAY?

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE'? 'HE'S DEAD'?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: HE FELT LIKE HE WAS DEAD? (INAUDIBLE)

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE AND I THINK HE'S DEAD'? YOU REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU DO REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: ANYTHING ELSE?

LT. R.L. HAMLIN: OTHER THAN BEING SCARED AS HELL, HUH?

MARK A. LILLY: YEAH, THAT'S THE TRUTH, MAN.

LT. R.L. HAMLIN: I KNOW, I CAN TELL LOOKING AT YOU, YOU'RE SCARED TO DEATH.

MARK A. LILLY: SEE SOMEBODY BLOWN AWAY, GODDAMN.

INV. R.F. FLEET: I KNOW.

MARK A. LILLY: I AIN'T NO VIOLENT PERSON. I'VE NEVER BEEN ARRESTED FOR VIOLENT CRIMES, YOU KNOW.

INV. R.F. FLEET: ALL RIGHT, THAT'S THE END.

LT. R.L. HAMLIN: OKAY, THIS WILL BE THE END OF THE INTERVIEW. THE TIME IS 2:53 A.M.

END

pistol. Does this look familiar?

A. Yes, it does.

Q. All right. And why does that look familiar?

A. Well, that gun was one of the guns that was brought in that evening.

Q. All right. And you indicated the guns came out one more time. What was done with the guns when they came out?

A. Well, ah, one of the guns was, ah, kind of pointed at, at me and, ah, I'm not sure if it was in a joking manner or, or what, but -

Q. Which one of the guns were pointed at you?

A. It was the, ah, it was the 30/30.

Q. 30/30 rifle?

A. Yes, sir.

Q. And who was pointing the gun at you?

A. Gary.

Q. Do you know whether it was loaded or not?

A. I have no idea.

Q. All right. So, he pointed it at you and

you said you didn't under-, know whether was, he was joking and you didn't know whether he was not joking?

A. Right.

Q. Well, what, what lead you to that conclusion?

A. Well, -

MR. SCHWAB: Objection, Your Honor. That answer calls for a conclusion.

MR. TUCK: What factors? He, he, he has a conclusion. He's -

THE COURT: I, I, I do sustain that, but go ahead and rephrase. I think you can get to it.

Q. What factors specifically, I'm talking about what factors specifically lead you to believe that you didn't know whether he was joking or not?

A. Well, we were drinking and, ah, you know, when, when a person is on alcohol, you know that they don't always do the things that they mean to do -

Q. All right.

A. And so that's why, what brought me to the assumption that, you know, he might have been joking and

A. No, sir.

Q. And what are they saying, well, strike that question. Now, so they come up there and they're talking and what occurs after the conversations?

A. Ah, there was, ah, there was just a few words exchanged, ah, the neighbor we went to go visit got a little harsh and, ah, then after that, ah, I seen the, ah, Mark with the, with the gun, with the gun that you just showed me there.

Q. The pistol?

A. Yes, sir.

Q. Where did Mark have it on his person?

A. He had it in, in, ah, a sweater jacket with a pocket on it and a hood.

Q. And what was he doing with that weapon?

A. Well, I, I heard it, I heard it click back.

Q. And you say you heard it click back. What are you talking about?

A. The pistol.

Q. All right. You heard it click back again.

You heard the pistol click back. Was there a portion of the pistol you heard click back?

A. Well, the hammer.

Q. All right. And what did you see?

A. Ah, I saw it brought out just, just a little bit, not much. You could barely even see it. It was just -

Q. And what did you do when you saw the gun coming out?

A. I looked at him.

Q. And is that it? You just looked at him?

A. I looked at him and kind of pointed my finger towards him.

Q. And why did you -

A. Then -

Q. Why did you do that?

A. Well, I had a feeling that the gun was going to be pulled.

Q. Let, whoa, whoa, whoa. You, you can't get into your feeling. I -

MR. SCHWAB: That's okay, Your Honor.

Q. You saw it coming out?

A. Yes.

Q. And you pointed at him. I, I cut your answer off when you were asking, answering that question. You were pointing it, a, the finger -

A. Right.

Q. At Mark Lilly and you were getting, did you say something when you pointed the finger?

A. No, I didn't say anything.

Q. Okay. And what did he do when you pointed at him after he pulled the hammer back on the, the revolver?

A. He put the gun away.

Q. He slid, when he said put it back, where did he put it?

A. He, he, he slid it back in his pocket. He didn't have it all the way out. He just slid it back in his pocket.

Q. Now, you indicated, ah, that there was some, ah, like heated words, is that correct?

A. Yeah, ah, it, ah, the neighbor, the

neighbor that we went to go visit got a little harsh like I said.

Q. He got a little harsh?

A. She got a little harsh.

Q. She got a little harsh. She was angry?

A. Ah, no, she wasn't angry. She's just that way.

Q. Okay. I think we probably all know a few people and that's when Mark pulled out the revolver and pulled the hammer back?

A. Correct. He didn't pull it out all the way. He just slid it out a little bit.

Q. And, and pulled the hammer back on it?

A. Right.

Q. And they weren't drinking at that point in time?

A. No, sir.

Q. Okay. When, all right, he pulls the hammer back. What happens after that?

A. Well, ah, after he slid it back in his pocket and everything they got up and left.

A. But as he leaned on the bar, well, I watched, I was looking at him.

Q. And he looked at you right in the face?

A. Yes, sir, he did.

Q. And did he tell you -

A. He told me, he told me to not to look at him either.

Q. He told you not to look at him?

A. Yes, sir, he did.

Q. And did he have anything in his hand?

A. And at that time I was, at that time I was very shook up just to tell you the truth.

Q. I can imagine. Did he have anything in his hand?

A. Yes, sir, he did. That's what I said, he had a pistol in his hand pointed at me.

Q. Does this resemble or the pistol that he had in his hand?

A. Well, I'll have to say that at that time I was probably so scared that I thought it looked bigger, but it did look a little bit bigger, but, yes, it does

there was something in your mind? Was there a reason why you didn't want Michael to go?

A. Well, the remark that Gary had made, yes, sir.

Q. All right. And what was that remark specifically?

A. That he could kill his best friend without regretting it.

Q. And that was the reason that you didn't want your son to go with them?

A. Yes, sir.

Q. All right. And this was approximately 1:30 the afternoon of December the 5th, is that correct?

A. Yes, sir.

Q. All right. Your Honor, that would be all the questions I have for this witness. We would offer it for the truth of her, why she did things. Not for the truth of the matter asserted, which was a different ground than we originally based it under. We would also raise it under the ability to be able to impeach for the reasons stated earlier. This is, would be her testimony

Q. Okay. I'm asking you what happened?

A. What happened.

Q. Just start from the beginning. Let's start off with what you saw happen and then I'll stop you if, if I have any questions. How's that?

A. Well, -

Q. Just go from the beginning and, and, you've got -

A. Word for word, I really don't know what was said.

Q. Well, I'm not asking you what -

A. Ah, but we know that a gun was pointed at Howard.

Q. All right.

A. He was told to get on the floor.

THE COURT: I think if she didn't hear any statements made, I think she needs to confine her testimony -

MR. TUCK: All right.

THE COURT: To what she herself observed.

Q. Okay.

A. And I pushed him kindly back in a, the gun hit me in the stomach, you know, the barrel -

Q. Uh-huh.

A. And I don't know what happened. I just backed up.

Q. All right. Did he say anything to you at that point in time?

A. Yes, sir.

Q. What did he say to you?

A. He said, I'll blow your head off.

Q. Okay. And who was that that had the gun?

A. The blonde headed fellow.

Q. All right. Did he point the gun at you when he said that?

A. Yes, sir, he sure did.

Q. And what did he do after that? I mean -

A. I, I told the clerk, I said, give him the damn money, Mona.

Q. And then what did you do after that?

A. And the other, the other guy walked, got,

key every way I could. Well, Bill come in about that time, and he said, what's wrong, Mona, and Barkley says, lay in the floor.

Q. Where was the gun when he -

A. On the counter.

Q. On the counter.

A. And Bill grabbed him and they went in a candy rack and, of course, he dropped the gun, but Barkley got it and he pointed the gun at Bill, he said, I'll shoot your damn head off.

Q. All right. Now, how far did, I believe you called him Barkley. Was he the short guy?

A. Yes.

Q. How far was the gun away from Bill?

A. You mean after he pointed it at his head?

Q. Yeah. Yes, ma'am.

A. It was right up to, almost at him.

Q. Almost at him. Ah, within two feet of him?

A. Well, about like this. Well, no, you come a little closer.

Q. Okay.

A. And it was up like this.

Q. Looked like that?

A. So, -

Q. And then, all right, go ahead. I'm sorry.

A. When I looked because I felt like he, he was going to get me and when I looked he had the gun right up and Bill and the hammer was back on it. He said to Mark Lilly, he said, get the money and run. So, he run.

Q. The hammer was cocked back on that pistol?

A. On the gun.

Q. On the gun.

A. Because I was standing right there looking right at him.

Q. And then what happened after that?

A. Well, after Mark grabbed the money and run why he run.

Q. Did you see the automobile that they came in leave the convenience store?

A. Yes, I did.

things you wanted to tell the Court.

A. Sure.

Q. What is it that you want to tell the Court today?

A. Well, in some of the statements that me and Mr. Barker, Gary, give the cops and some of Gary's testimony from what I understand, it ain't really what happened.

Q. What specifically isn't really what happened?

A. Well, like the robbery, I said that -

Q. Which robbery? There were three that night.

A. Well, all three of them. One of the, in the statements and in Gary's testimony when he testified that it was Ben, he said that, ah, Ben was going to rob the boy. Ben never did because I did. I took Twenty-one ($21.00) Dollars off of him.

Q. So you lied to the police that night?

A. Yeah.

Q. How do we know that you're not lying now?

A. You tell me. I'm telling the truth now. You know, at the time, I was scared. The investigator started talking all these life sentences, you know, I could get and I got scared man. Throw it off on somebody else.

Q. Is there anything else you want to tell the Court?

A. Us see. Not that I can think of.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: Yes, sir.

Q. Did you, you told the police that you saw your brother kill Alexander Defilippis, is that correct?

A. Yeah, that's what I had said, but I, I can't say that for sure. I can't say for sure who killed him, you know, either party. I can't say for sure.

Q. Why's that?

A. Because at the time of the shooting, I was on the other side of the car throwing up all the liquor and beer that I had been drinking throughout the day.

Q. Now, you told the police that you never

exited the vehicle down at Whitethorne Landing. Did you lie then?

A. Yeah. Everything I told the cops I lied.

Q. You are aware that they placed that statement that you gave to the police before the jury, is that correct?

A. Yeah.

Q. And you did nothing to come forward at that point in time?

A. Right.

Q. And why is that?

A. I hadn't been to Court yet.

Q. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. So, everything you told the police was a lie?

A. Yeah.

Q. So you did kill him, is that what you're saying?

A. Ah, -

Q. You told the police you didn't kill him, so if you lied about everything, then you must have killed?

A. I never killed him.

Q. Who killed him?

A. I don't know. I can't say for sure who killed him.

Q. Who had the pistol?

A. At the time of the murder? I can't say for sure because I don't know.

Q. Did you have the pistol before the murder?

A. No.

Q. Who had the pistol?

A. I can't say for sure, you know, because I do not know.

Q. You don't know?

A. Right.

Q. You had the pistol up till the time you

Q. Did anybody in your family encourage you to call Mr. Tuck?

A. Huh-uh.

Q. Does it have anything do to with your being here today that there's a custody petition concerning your child pending in the J & D Court?

A. I don't see where my kid has anything to do with it while we are here now.

Q. Well, that's my point. Does it or doesn't it? You didn't call Mr. Tuck until after your mother filed to have custody of your child?

A. That ain't got nothing to do with it, man.

Q. Why do you blame it on Gary Barker instead of your brother?

A. Well, me and Gary we, we've been, we've been in a whole lot of trouble together and Gary knows a whole lot on me and if it was to do over, I wouldn't have told y'all nothing, you know. I wouldn't told y'all nothing. I would have took the Fifth.

Q. So, you don't know that your brother didn't kill him, do you?

What is the legal definition of "circumstantial evidence"?

proof in the record to

federal 10-3566
6.55pa mandatory life
criminal court attorneys
Allen & Rocco
clerks

IN THE

SUPREME COURT OF VIRGINIA

Record Nos. 972385 and 972386

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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c. Any error was harmless.

Lilly's confrontation argument should be rejected because the trial court properly exercised its discretion in allowing the hearsay into evidence and because the hearsay clearly did not violate the Confrontation Clause. However, even if an error had occurred, it would have been harmless in this case. See Lee v. Illinois, 476 U.S. 530, 547 (1985) (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against [the defendant]"); Schindel v. Commonwealth, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (erroneously admitted hearsay harmless when the content of the out-of-court statement is clearly established by other evidence). Here, the other evidence overwhelmingly proved that Benjamin Lilly committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA 2254-2282, 2318-2332).

It was the defendant's car that was used in the initial part of the crime spree and the defendant's car that broke down, necessitating replacement with another vehicle, and such action most likely was undertaken by the owner of the disabled car. When he was apprehended wielding a shotgun, the defendant lied to the police officers about his identity and that of his accomplices, and that deceptive behavior most likely was engaged in by a guilty person. The defendant made incriminating statements: at the apprehension site, the defendant called to his brother to give himself up because he was "not the one who has done anything wrong;" in the police car, he asked Officer Whitsett to kill him and when the officer asked what a murderer looked like, said "me." A forensic examination of the accomplices' clothing found blood on the defendant's pants leg, yet no blood on Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that

his guilt was established by evidence independent of the hearsay statements and that the admission of the hearsay, even if erroneous, was harmless beyond a reasonable doubt.

3. The Trial Court Properly Denied the Motion to Suppress Lilly's Statements Made to Officer Whitsett. (Assign. Error 24, 25)

Lilly argues that the trial court erred in admitting into evidence the statement he made to Officer Whitsett while he was sitting in a police car after he had been apprehended. The challenged statement was Lilly's response "me," made after Whitsett asked, "what does a murderer look like?" (JA 263). Lilly says that the response "me," should not have been admitted because Whitsett had not given him warnings under Miranda v. Arizona, 384 U.S. 436 (1966), and because Whitsett's recollection of the response was not clear or positive. Neither argument, however, demonstrates error.

First, there was no Miranda error because Whitsett was not required to give the warnings. Miranda applies only to "custodial interrogation." Custodial interrogation takes place when an officer expressly questions a suspect in custody with questions he knows are "reasonably likely to elicit an incriminating response." Jenkins v. Commonwealth, 244 Va. at 453, 423 S.E.2d at 365 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). The police do not "interrogate" a suspect simply by responding to questions initiated by the suspect. Jenkins, 244 Va. at 453, 423 S.E.2d at 365. A suspect's statements in such situations are considered "volunteered" and outside the strictures of Miranda. See id.; Wave v. Commonwealth, 219 Va. 683, 693, 251 S.E.2d 202, 208 (Miranda does not apply to volunteered statements or to responses to general "on-the-scene questioning as to facts surrounding a crime") (quoting Miranda, 384 U.S. at 477, 478), cert. denied, 442 U.S. 924 (1979).

As the trial court found, when Lilly made his statement, "me," he was not being interrogated. (JA 362). Lilly was apprehended and placed in a police car while the officers searched for the other robbery suspects. (JA 258). Whitsett was standing guard by the car

ORIGINAL

Supreme Court, U.S.
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No. 98-5881

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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COMMONWEALTH'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should certiorari be granted to review arguments which were not properly preserved because they were not presented to the Virginia Supreme Court until Lilly filed a petition for rehearing?

2. Should certiorari be granted to decide whether a hearsay exception is "firmly rooted" in the law even though a determination of the issue can have no effect on Lilly's case because Virginia law requires a "reliability" determination in every case involving hearsay?

3. Should certiorari be granted to review the Virginia Supreme Court's fact-bound determination that hearsay evidence was reliable and therefore admissible under Virginia's exception for declarations against penal interest?

4. Should certiorari be granted to decide whether a State may require independent corroborating evidence of the trustworthiness of a hearsay declarant's statement against penal interest?

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STATEMENT OF THE CASE

Benjamin Lilly was tried by a jury in the Circuit Court of Montgomery County, Virginia, and found guilty on October 25, 1996, of the capital murder of Alexander DeFilippis as well as of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of the illegal use of a firearm.

In a separate sentencing proceeding on October 28, 1996, the jury sentenced Lilly to death for the capital murder on the basis of both of Virginia's aggravating factors: "future dangerousness" and "vileness." See Va. Code § 19.2-264.4. The jury also sentenced him to life imprisonment for robbery, life imprisonment for carjacking, ten years for abduction, five years for possession of a firearm by a felon, and four terms of three years each for the four convictions of the illegal use of a firearm. After considering a probation report and other evidence presented during the post-sentencing hearing held on February 11, 1997, the trial court imposed the sentences which had been fixed by the jury: one death penalty, two life sentences plus 27 years in prison.

On April 17, 1998, the Virginia Supreme Court unanimously affirmed the convictions and sentences. Lilly v. Commonwealth, 255 Va. 558, 499 S.E.2d 522 (1998). On June 5, 1998, the Virginia Supreme Court denied Lilly's petition for rehearing.

STATEMENT OF FACTS

Sometime on December 4, 1995, twenty-seven-year-old Benjamin Lilly got together with his twenty-year-old brother, Mark Lilly, and Mark's nineteen-year-old roommate, Gary Barker, at the defendant's home in Riner, Virginia, to drink and "smoke a little...pot." (JA 2030-2031).[1] Later that night, the three men decided to go to Floyd County to Danny Saunders' home. (JA 2031). The defendant drove them in his Mercury Cougar. (JA 2030). Mark and Gary knew Saunders, had been to his home before and knew that he kept liquor and guns there. (JA 2032).

[1] References to the Joint Appendix filed below are denoted as "JA ___." Copies of those parts referenced herein are included in the Respondent's Appendix A filed with this brief.

When they arrived at Saunders' home and found that Saunders was not there, they "decided just to go on in and help ourselves." They "[b]usted out the front glass in the door," went inside and took 9 bottles of liquor and 3 guns. (JA 2033). The guns were a .35-caliber rifle, a 16-gauge shotgun and a .38 caliber pistol. (JA 2032). Each gun was loaded. They also took a safe. (JA 2034).

They loaded everything into the defendant's car, went to the defendant's sister's home and "busted" open the safe. Inside they found old coins, a money clip, stamps and knives. They split up the loot, began drinking the liquor and then decided to drive to Warren Nolen's home in Radford to see if they could "trade the guns for some dope." Nolen was the defendant's friend. (JA 2035-2037). Around 7:30 p.m., they arrived at Nolen's home in Radford and displayed their loot to Nolen and his girlfriend, Patricia Quesenberry. (JA 1599-1601, 1586-1588). Patricia knew that Nolen could get into trouble if he was around guns because he was a convicted felon (JA 1589, 1601), so she and Nolen told the defendant and his companions to leave. (JA 1590). The three left after determining that they would be unable to sell or trade the loot because Nolen did not have "enough dope." (JA 2037).

The three men then drove to the trailer in Blacksburg where Mark and Gary rented rooms from "A.J." Fall, and spent the remainder of the night there. (JA 2038). The defendant, Mark and Gary left A.J.'s together on December 5, 1995, at about noon. (JA 2440). They drove the backroads around Shawsville and Elliston, drinking the stolen liquor. They stopped at a small country store, pumped gas for the car and left without paying. (JA 2040). They stopped in a wooded area of Shawsville where Gary fired the rifle and both Mark and the defendant took turns firing the pistol. (JA 2041). They then drove to Alleghany, stopped at a church and Gary and Mark shot at some geese with the rifle and shotgun. They killed one goose and placed it in the trunk of the car. (JA 2043).

They then drove back to the Blacksburg trailer park where they tried, unsuccessfully, to sell

or trade the guns for "dope." (JA 2044-2046). At about 6:00 p.m., the three drove to a bar in Blacksburg called "Cowboys." They entered the bar where Mark recognized Ron Lucas from his construction job. (JA 1613). Mark asked Ron to go outside, showed Ron the pistol and offered it for sale. Ron asked if it was "hot," meaning stolen, Mark told him it was, and Ron handed it back to Mark. (JA 1614-1615). The defendant and Gary then came outside, Ron went back in the bar and the defendant, Mark and Gary drove away. (JA 1615, 1619).

They drove along Prices Fork Road heading into Blacksburg with the intention of returning to the trailer park to find some "dope." (JA 2049). As they were driving, however, the car's engine quit at the top of a hill and they were forced to coast the car to a position on the wrong side of the road and across from a convenience store. (JA 2050-2051). They got out of the car, removed the license plates, liquor and guns, with the intention of "stashing" them in the woods until they could "steal" a car to "get out of there." (JA 2051). Gary had the rifle, Mark had the shotgun and the defendant had the pistol. (JA 2052).

In another part of Blacksburg – College Park – two Virginia Tech students were preparing for their upcoming final exams. Tom Staeger and Alexander DeFilippis had been roommates and friends for four years. Alexander was twenty-two years old and was majoring in environmental science. (JA 1503-1504). He planned to spend the holidays with his family in this country and in Italy. (JA 1504).

That evening – December 5, 1995 – Tom and Alex left their apartment in College Park in Alex's car at about 7:00 and drove to a friend's to borrow some class notes. (JA 1503-1504). Alex drove his Plymouth K-car. (JA 1508-1509). Alex wore glasses and a watch and carried a wallet with a few dollars in it. (JA 1503-1504). They had planned to copy the notes at a convenience store's copier machine and then go to the school's library to study. (JA 1503). Alex drove them to a convenience store called the "Hethwood Express." (JA 1505).

On their way to the store, Alex hit a curb with his right front tire. (JA 1509). When they

arrived at the store, Alex got out to look at his tire while Tom went inside to copy the notes. (JA 1510). That was the last time Tom saw Alex because, when he came out of the store, neither Alex nor his car were there. Tom called their apartment to see if Alex had returned, found out that he had not, and then noticed what looked like an abandoned car across the street. (JA 1506). Tom called "911" and the Blacksburg Police Department responded at about 7:20 p.m. (JA 1507).

When the defendant and his companions abandoned their car across from the convenience store, the defendant told the others to walk into the woods and "he would get us a car." (JA 2052). The defendant walked over to Alex, pointed the pistol at him and told him to give him his money. (JA 2054). Alex handed over his wallet. (JA 2055). The defendant called to Mark and Gary and they all got in Alex's car. (JA 2055-2056). The defendant got in the driver's seat, Gary got in the passenger's seat and Mark got in the back seat. The defendant ordered Alex to sit in the back with Mark. (JA 2054).

The defendant drove off towards Whitethorne, and during the ride Alex told his abductors that he would have given them a ride if they had asked, implored them to take him back to the store to pick up his friend and promised he would take them wherever they needed to go. (JA 2056). The defendant drove across a bridge and onto a deserted stretch of property owned by the Norfolk and Southern Railway Company. (JA 1721, 1764). The defendant stopped the car and Mark and Gary told Alex to close his eyes when they opened the car door to get out so that Alex could not see their faces. Mark had the pistol in his waistband at that time. (JA 2057).

After they all got out of the car, Mark told Alex to start walking and then the defendant ordered Alex to take his clothes off. (JA 2061). The night was cold and windy and it started snowing later. (JA 1734). Alex stripped down to his underwear briefs and socks. (JA 2061). Gary and Mark thought they were going to leave Alex there, forcing him to walk to a phone. (JA 2062-2063). Gary got back into the car in the driver's seat and Mark got in on the passenger's side. (JA 2063). The defendant got into the back seat and demanded that Mark give him the pistol. (JA

2064).

The defendant ran after Alex, who had walked about fifty yards, turned him around and shot him four times with the pistol. (JA 2063-2064). Three of the shots were to Alex's head: one bullet went straight through the right side of his upper lip; one bullet went into his neck under his left earlobe and out through the back of his neck; one bullet went into his head above the right ear, through his brain and lodged in the left temporal bone. A fourth bullet went straight through his right forearm. (JA 1973-1974). All four shots were fired from a distance of more than two feet. (JA 1974). Alex died shortly after he was shot in his brain. (JA 1976).

With the first shots, Alex threw his arm up in defense and tried to stagger away. (JA 2064). When the fatal shot was fired, Alex fell backwards onto some discarded steel containers. (JA 1722). Alex's eyeglasses were found later at a distance of close to fifty feet away from where he finally fell. (JA 1825). A zigzagging blood trail showed where Alex had staggered before he fell. (JA 1735).

After the shooting, the defendant got into the car and told Gary and Mark that "that boy saw his face" and "I've been in the penitentiary and I ain't going back." (JA 2065). With Gary driving, the three left the area and drove to a store where the defendant bought beer with the money they had taken from Alex. (JA 2066). They then drove to the river and threw away items they believed contained their fingerprints: Alex's clothing and backpack and the plastic cover over the car's speedometer. (JA 2067).

They discussed where to go to hide out and the defendant suggested that they stay with friends of his in West Virginia. (JA 2070-2071). To obtain money for the getaway, they drove to the H&L Market in Eggleston in Giles County to rob it. When they arrived, they argued over who would carry the gun inside. (JA 2069). The defendant said that he had done "what he had to do already," so Gary carried the pistol inside. (JA 2071). The defendant went in with an eight-inch knife. (JA 2553). They entered the store, held the owners at gun and knife point and robbed them

of $425.00 in cash, as well as food stamps, a radio, beer, tobacco, gloves and sunglasses. (JA 2479-2490, 2547-2556). After the robbery, they drove to a railroad trestle where they counted the money, divided it up and decided it was not enough. (JA 2075).

With Gary driving, they then went to the M&W Market in Pembroke. Gary and Mark went into the store and Gary held the pistol up to the clerk and demanded her money. (JA 2575). The defendant remained in the car. (JA 2076, 2573). The owner, Bill Williams, came into the store and knocked the gun out of Gary's hand, but Gary retrieved it and continued to demand money. (JA 2576-2577). The clerk handed over a money bag filled with change and the robbers left the store. Williams told the clerk to call the police, ran to his car and pursued the three robbers long enough to get their license plate number. (JA 2580). The defendant was driving the car, Mark was in the passenger seat and Gary was in the back seat. (JA 2079). When they saw Williams in pursuit, Gary pointed the rifle out of the window and fired it. (JA 2079-2080). The shot did not result in injury to any person or property. (JA 2586).

Officer Price of the Giles County Sheriff's Department and Officer Tilley of the Pearisburg Police Department each had responded to the scene of the Eggleston robbery and were on their way to the reported second robbery in Pembroke when they came upon the robbers' car headed towards them. (JA 1648, 1703). The car had stopped due to engine trouble and the defendant, Mark and Gary were attempting to remove the guns, radio, beer and other evidence from the car. (JA 2080-2081). Gary ran a few yards down an embankment and hid with the rifle. (JA 2081). Mark ran away through the woods.

The defendant was apprehended as he got out of the car, armed with the shotgun. (JA 1704-1705). Tilley and Price disarmed the defendant and a search disclosed the knife in his pants pocket. (JA 1649-1650). Upon questioning, the defendant falsely told them that there were three others with assault weapons, that one of them was named Mike Rader and that he (the defendant) was an undercover officer with the Montgomery County Sheriff's Office who had been picked up by the

others while he was hitchhiking. (JA 1650-1651).

Several officers arrived at the scene and began to search for the other suspects. The officers heard Gary crying down in a ditch about fifty feet from the car. (JA 1875). Gary was sitting down with the barrel of the rifle up against his head. (JA 1858). The officers talked Gary into surrendering. The defendant asked the officers if he could use their loudspeaker to talk to his brother and he was allowed to do so. (JA 2186). The defendant called Mark by name, asked him to "come out" and said, "You're not the one that's really in trouble here. You're not the one that's really done anything wrong." (JA 2187).

Chief Gautier of the Pembroke Police Department received a call that a suspect had been seen breaking into a house nearby and walking towards Blacksburg on Route 460. (JA 1885). The officers found Mark a short time later walking along Route 460. Upon apprehension, he falsely identified himself as Mark Rader. (JA 1886).

The defendant was placed in a police car while the search for the others proceeded. Chief Whitsett of the Pearisburg Police Department was standing guard alongside the car in which the defendant sat. (JA 2194). At that time, the only crimes the police knew about were the two robberies in Eggleston and Pembroke. (JA 2198). The window was down a few inches and the defendant called him over and asked if Whitsett "would do him a special favor." The defendant asked him if he would put the barrel of the officer's shotgun in the defendant's mouth and pull the trigger. (JA 2196). Whitsett told him he could not oblige and asked the defendant "if I [Whitsett] looked like a murderer?" (Id.). Then the defendant said something to prompt Whitsett to ask, "What does a murderer look like anyway?" to which the defendant responded, "me." (JA 2197). The defendant then stated that "he was going to hell to meet his [other] brother" who had committed suicide eight years before. (Id.).

The defendant was taken to the Giles County Sheriff's Office and was interviewed by Officer Price. The defendant said he was with his younger brother Mark, Gary Barker and one

Mike Rader, and that the others had committed the robberies in Eggleston and Pembroke. (JA 1662-1676). He stated that he was forced at gunpoint to participate in the robberies and he made no mention of the larceny of the guns from Danny Saunders' house or the murder and robbery of Alex DeFilippis. (JA 1666, 1674).

After his interview, Price asked the defendant if he would submit to a Gun Shot Residue test. (JA 1678-1679). The defendant declined the request and began to rub his hands together and on his pants legs. (JA 1679, 1926-1927).

Price then interviewed Gary Barker about the robberies. During the interview Price learned from a police dispatcher that the car the trio had been driving had been reported stolen and its owner abducted. (JA 1680). Price asked Barker about the car and Barker became "very emotional" and said that "a bad thing had happened." (JA 1681). Both Mark and Gary told the police what had happened, including the fact that the defendant had shot and killed Alex. Gary drew a map directing the officers to the location of Alex's body and later went with Officer Fleet of the Montgomery County Sheriff's Office to the area of the New River where they had discarded Alex's clothing. (JA 1771).

The officers also recovered the murder weapon about seventy-five feet away from Alex's car in a ditch. (JA 1907). The day after the murder, a citizen found Alex's wallet about a quarter of a mile from Alex's car in the direction of Pembroke. (JA 1888).

When the defendant was arrested, he had on his person several coins which had been stolen from Saunders' house. (JA 1920). Alex's watch was recovered from the back of Alex's car. (JA 1780). The bullet recovered from Alex's brain was determined to have the same class characteristics as bullets fired from the .38-caliber revolver stolen from Saunders' house. (JA 3523).

A forensic expert determined that there was blood on the bottom right leg of the defendant's blue jeans that were worn on December 5, but the amount of blood did not permit a DNA test to be

performed. (JA 2018-2019). Blood found on Gary Barker's underwear was determined by DNA testing to be his own blood. (JA 2014). No blood was found on Mark Lilly's clothing. (JA 2007).

At trial, Gary Barker testified extensively against the defendant. (JA 2026 et seq.). Mark Lilly was called to testify but refused to do so under the Fifth Amendment. (JA 2243-2244). The trial court found Mark Lilly to be unavailable for purposes of the hearsay exception for declarations against penal interest and permitted the Commonwealth to introduce into evidence Mark Lilly's tape-recorded pretrial confessions made to the police. (JA 2253-2282). The trial court made the following findings:

> Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:
>
> The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't [sic] against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole.
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> * * *
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> All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth has met its burden in determining the unavailability of his testimony, so, therefore, in conjunction with the Court's prior ruling that finding is made.

(JA 2226-2227, 2244-2245).

The defendant did not testify in his own defense, but rather put on witnesses to say that Gary Barker had a reputation for untruthfulness (JA 2417, 2627), that Gary had made statements to the effect that he would kill his best friend and anyone who tried to arrest him (JA 2525, 2529), and that the defendant was not seen in actual possession of the stolen guns at all times. (JA 2384, 2435). The jury returned guilty verdicts on all nine charges. (JA 2784-2785).

During the separate sentencing hearing, the Commonwealth presented both record and testimonial evidence of the defendant's extensive criminal history, including over thirty convictions for crimes ranging from public drunkenness to assaults, breaking and entering, larceny and malicious wounding. (JA 2818-2868). The defendant put on a variety of mitigation evidence, including a mental health expert and family members who described his childhood and abusive father. Dr. Nelson, a forensic psychologist, admitted that he could not say that the defendant never would commit another violent act. (JA 2921-2922). The jury found Lilly a "future danger" and his crime "vile" in that it involved torture, depravity of mind and aggravated battery, and sentenced him to death. (JA 3017).

During the post-sentencing hearing in which the probation officer's report was considered, the defendant presented the testimony of, among others, Mark Lilly. Mark testified that he had lied to his attorneys and to the police and that it was he, rather than his brother, who had ***robbed*** Alex DeFilippis. (JA 3095-3101). Mark denied shooting Alex, however (JA 3098), stated that he did not know who shot Alex and that he could not say that his brother had not shot him. (JA 3102). At the conclusion of the hearing, the trial court sentenced Lilly in accordance with the jury's verdicts.

On appeal, Lilly made two arguments with respect to the admission of Mark's statements. He first argued that, as a matter of state law, the hearsay exception for declarations against penal interest did not, and should not, apply to declarations made by any witness which the

Commonwealth sought to introduce against the defendant. (Resp. App. B-7 to B-11). Lilly's primary contention was that the Virginia Supreme Court had erred when it allowed such hearsay in Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219 (1995). With the exception of a reference to "the confrontation clause, the fifth, sixth, and fourteenth Amendments" in the heading of his argument, and one reference to Chambers v. Mississippi, 410 U.S. 284 (1973), in the argument, Lilly's first argument was devoid of any reference to federal law.

Lilly's second argument below was that, again under Virginia case law, Mark's pretrial statements were not truly against his penal interest. (Resp. App. B-11 to B-17). Lilly recited the federal constitutional amendments in the heading to his argument and contended at the end of his argument in conclusory fashion that the Constitution had been violated because he had not been able to confront Mark Lilly at trial. (Resp. App. B-11, B-16). Lilly's argument, however, was based upon state law governing the issue as expounded in two decisions from the Virginia Supreme Court on the state evidentiary rule. (Resp. App. B-11, B-12). Lilly did not rely on a single federal case. Indeed, nowhere in his opening brief did Lilly address the trial court's finding that the hearsay exception was firmly rooted in Virginia law or the fact that its finding that the evidence was reliable relied in part on corroborating evidence.

The Commonwealth's response to these arguments was three-fold: (1) Chandler had been decided correctly and there was no *per se* constitutional bar against such evidence; (2) the evidence was admissible because it came in under a firmly rooted exception to the hearsay rule and because it was reliable considering all the evidence; and (3) any error was harmless. (Resp. App. C-1 to C-9).

Lilly's reply brief filed below recited two cases from this Court for the general principle that accomplice's confessions are presumptively unreliable – Lee v. Illinois, 476 U.S. 530 (1986) and Williamson v. United States, 512 U.S. 594 (1994) – and then argued that the Commonwealth's harmless error argument had no merit. (Resp. App. D-1 to D-4). Nowhere in the reply brief did

Lilly take issue with the Commonwealth's argument that the hearsay exception was firmly rooted or that the corroborating evidence demonstrated the reliability of the hearsay evidence.

The Virginia Supreme Court made the following findings in its decision affirming the trial court's evidentiary ruling:

> At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.
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> In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."
>
> To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. Ellison v. Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." Boney v. Commonwealth, 16 Va. App. 638, 643, 432 S.E.2d 7, 10 (1993); see also Newberry v. Commonwealth, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).
>
> To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. Chandler v. Commonwealth, 249 Va. 270, 278-79, 455 S.E.2d 219, 224-25, cert. denied, 516 U.S. 889 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. Id.
>
> Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to Chandler, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, Chandler improperly enlarged the exception to permit the

Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that Chandler was wrongly decided and should be overturned. We disagree.

We recognize that Ellison, Newberry, and other cases that applied this hearsay exception prior to Chandler involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in Ellison, the admission of such statements must be left to the sound discretion of the trial court, to be determined upon the facts and circumstances of each case. But, in any case, once it is established that a third-party confession has been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of Hines [v. Commonwealth, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime." 219 Va. at 408-09, 247 S.E.2d at 688 (emphasis added).

Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree. The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. Dutton v. Evans, 400 U.S. 74, 89 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
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> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the "'integrity of the factfinding process.'" . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.
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> White v. Illinois, 502 U.S. 346, 356-57 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence.* See Randolph v. Commonwealth, 24 Va. App. 345, 353, 482 S.E.2d 101, 105 (1997); Raia v. Commonwealth, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996).

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* Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

Lilly, 225 Va. at 572-575, 499 S.E.2d at 533-534.

After the Virginia Supreme Court issued its decision, Lilly petitioned for rehearing of the hearsay claim on several new grounds. Lilly argued for the first time that this Court's "joint trial/hearsay" cases and its federal rules cases applied to the hearsay issue in his single-defendant trial. (Resp. App. E-1 to E-2).[2] Lilly also argued for the first time that Virginia's hearsay exception for declarations against penal interest was not "firmly rooted" in the law. (Resp. App. E-3). Finally, Lilly argued – again for the first time – that under Idaho v. Wright, 497 U.S. 805 (1990), a determination of the reliability of the hearsay statements for purposes of admission under Virginia's hearsay exception could not, as a matter of law, take into consideration evidence outside of Mark's statements that corroborated and validated the truth of the statements Mark had made. (Resp. App.

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[2] Lilly relied on Bruton v. United States, 391 U.S. 123 (1968) and Williamson v. United States, 512 U.S. 594 (1994).

E-6). The Virginia Supreme Court denied the petition for rehearing in an unpublished, summary order. (Resp. App. F).

REASONS WHY THE WRIT SHOULD BE DENIED

I. LILLY'S CERTIORARI ARGUMENTS WERE NOT FAIRLY PRESENTED TO THE VIRGINIA SUPREME COURT.

In the Supreme Court of Virginia, Lilly briefed and argued thirty-four assignments of error. (Resp. App. B-1 to B-6). As shown above, Lilly made only two arguments pertaining to the evidentiary ruling allowing Mark Lilly's pretrial statements. Even a cursory review of Lilly's arguments made below demonstrates that they are not the same arguments he now makes in his certiorari petition. In the court below, Lilly argued primarily that Virginia's hearsay exception for declarations against penal interest did not apply at all to statements admitted against a defendant. Lilly concluded without analysis that such an exception would violate the Confrontation Clause. (Resp. App. B-11). Lilly makes no such argument in his certiorari petition.

Lilly also argued below that, under Virginia's Chandler decision describing the hearsay exception, Mark Lilly's particular statements did not qualify because they allegedly were not "against his penal interest." (Resp. App. B-12). Lilly again concluded, without analysis, that the Confrontation Clause had been violated. (Resp. App. B-16). Lilly makes no such state law argument in his certiorari petition.

Lilly's 31-paged certiorari petition is devoted solely to the evidentiary hearsay claim. In it, Lilly essentially makes three arguments: (1) Under Lee v. Illinois, 476 U.S. 544 (1986), Bruton v. United States, 391 U.S. 123 (1968) and Williamson v. United States, 512 U.S. 594 (1994), Mark Lilly's pretrial statements were *per se* inadmissible and "no court" ever has upheld the admission of such statements; (2) the hearsay exception is not "firmly rooted," and the federal courts of appeals allegedly are "split" over this issue; and (3) Mark Lilly's statements allegedly are unreliable if

"collateral" evidence corroborating their validity is ***not*** considered, and the federal courts of appeals and state courts allegedly are "split" over the issue of whether "collateral" evidence can be considered.

These arguments simply were not presented to the Virginia Supreme Court. As shown in Lilly's opening and reply briefs filed below, these three arguments were not made. To the extent they were raised in Lilly's ***petition for rehearing***, those arguments were not considered by the Virginia Supreme Court because they were not made in the first place. A petition for rehearing, by definition, presupposes that the matter has been "heard" in the first instance and the Virginia Supreme Court, like the federal courts, will not consider new matters on rehearing. See Nicholas v. Nicholas, 100 Va. 660, 665, 42 S.E. 866 (1902); Malady v. United States, 120 F.3d 119, 120 (8th Cir. 1997); United States v. Martinez 96 F.3d 473, 475 (11th Cir. 1996); United States v. Klotz, 503 F.2d 1056 (8th Cir. 1974); Weigand v. Wingo, 380 F.2d 1022, 1023 (6th Cir. 1967); Can v. F.T.C., 302 F.2d 688, 692 (1st Cir. 1962).

This Court does not sit to review issues that were not "properly" and "timely" raised in the lower court. Sup. Ct. R. 14(1)(g)(i) (petitioner must "show that the federal question was timely and properly raised"); Yee v. Escondido, 503 U.S. 519, 532 (1992); Illinois v. Gates, 462 U.S. 213, 218-220 (1983); cf. Duncan v. Henry, 513 U.S. 364, 365 (1995) (mere similarity of claims insufficient to satisfy exhaustion requirement of 28 U.S.C. § 2254). A fair review of Lilly's briefs filed below discloses that he did not formulate his current arguments until after the Virginia Supreme Court had decided his case on different grounds. This Court may not grant certiorari to determine issues in the first instance. The judgment of the Virginia Supreme Court that Lilly asks this Court to review simply did not rest on the issues he presents in his certiorari petition.

II. THE QUESTION OF WHETHER THE EXCEPTION FOR DECLARATIONS AGAINST PENAL INTEREST IS "FIRMLY ROOTED" HAS NO EFFECT ON LILLY'S CASE.

(Pet. Arg. B)

Even if Lilly had properly preserved his argument, it would present no "compelling" reason for a grant of certiorari. See Sup. Ct. R. 10. While it is true that, as a matter of federal constitutional law, hearsay may be admitted without violating the Confrontation Clause simply because it falls within a "firmly rooted" exception to the hearsay rule, see Ohio v. Roberts, 448 U.S. 56, 66 (1980), Virginia does not permit such liberal admission of hearsay evidence. Under settled Virginia law, hearsay evidence may not be admitted under the exception for declarations against penal interest unless the evidence meets three requirements: (1) the declarant must be unavailable; (2) the statement must be inculpatory of the declarant; ***and*** (3) the statement must be reliable and trustworthy. See Chandler, 249 Va. at 279, 455 S.E.2d at 224; Morris v. Commonwealth, 229 Va. 145, 147, 326 S.E.2d 693, 694 (1985); Ellison v. Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978); Hines v. Commonwealth, 136 Va. 728, 745, 117 S.E. 843, 847-848 (1923). Indeed, in Lilly's case, the Virginia Supreme Court followed its well-established law: it found that Mark Lilly was unavailable as a witness;[3] that he knew his pretrial statements implicated him in the crimes described; and that the statements "were clothed in the necessary indicia of reliability." Lilly, 255 Va. at 573-574, 499 S.E.2d at 534.

The Virginia Supreme Court also found that the hearsay exception was "firmly rooted" in Virginia law, id. at 575, 499 S.E.2d at 534, but that finding is superfluous to the Court's ultimate holding with respect to reliability. In other words, hearsay evidence in every Virginia case, including Lilly's, must be analyzed for reliability based upon the particular facts of the case. This Court has held that hearsay evidence may be admitted if it ***either*** meets the requirement of a "firmly rooted" exception ***or*** if it is independently reliable and trustworthy. See Roberts, 448

[3] The petitioner never has contested this fact.

U.S. at 65-66. Because Virginia requires the "reliability" analysis in every case, a Virginia case would be an entirely inappropriate vehicle for this Court to determine whether this particular hearsay exception is "firmly rooted." Therefore, regardless of how this Court were to resolve the purported split regarding whether the exception is "firmly rooted," it would have no effect on Lilly's case because the Virginia Supreme Court determined that the statement in question was reliable.[4]

III. LILLY'S "PER SE ERROR" ARGUMENT IS A MISSTATEMENT OF THE LAW.

(Pet. Arg. A)

Even if Lilly had preserved his argument below, this Court should not grant certiorari to review what is, at best, a non-issue. Lilly states in the first sentence of his argument (Pet. 17) that custodial confessions of a co-defendant are inadmissible under the Confrontation Clause. Implicit in his argument is an assertion that this Court essentially has outlawed the use of such hearsay statements. To the contrary, however, this Court expressly has held that such evidence ***may*** be admissible if it is found to bear sufficient indicia of reliability. In Williamson v. United States, 512 U.S. 594, 603 (1994), this Court held that "[e]ven the confessions of arrested accomplices may be

[4] To be sure, the hearsay exception is "firmly rooted" in Virginia law, dating back to 1923. See Hines, 136 Va. at 745, 117 S.E. at 848. However, the petitioner's list of cases supposedly finding the exception "firmly rooted" is grossly inaccurate: he cites Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991), but the Tenth Circuit later explained that the "firmly rooted" holding in Jennings was *dicta* and that the Tenth Circuit did not believe the exception "firmly rooted" for custodial confessions of co-defendants. Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996). Lilly cites three other cases – United States v. Keltner, 147 F.3d 662 (8th Cir. 1998), United States v. York, 933 F.2d 1343 (7th Cir. 1991) and United States v. Taggart, 944 F.2d 837 (11th Cir. 1991) – but in each case, the court of appeals engaged in a "reliability" analysis even after finding the hearsay exception "firmly rooted." And the two final cases Lilly cites are ones which cannot fairly be counted in the list: United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) was decided before this Court in Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986) hinted that the exception may not be "firmly rooted" for co-defendants' confessions; and United States v. Seeley, 892 F.2d 1 (1st Cir. 1989) merely followed the ruling in Katsougrakis. Thus, even though irrelevant to Lilly's (or any Virginia) case, the purported "split" over the "firmly rooted" issue is not a "split" at all: the lower courts uniformly treat confessions of co-defendants differently from other hearsay and, whether or not the general exception is "firmly rooted," hearsay evidence of a co-defendant's confession is analyzed by all courts for indicia of reliability and trustworthiness before it is allowed into evidence.

admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." See also id. at 605 (not deciding constitutional issue but noting that "genuinely self-inculpatory" nature of statement "is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause"). In Lee, the Court made clear that the presumption of unreliability generally associated with a co-defendant's confession is rebuttable, and that such evidence "may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" 476 U.S. at 543, quoting Roberts, 448 U.S. at 66.

Indeed, in Dutton v. Evans, 400 U.S. 74 (1970), this Court found no constitutional error in the admission of a co-defendant's hearsay statement, under facts strikingly similar to Lilly's case: Evans, Williams and Truett murdered three police officers in Georgia; Evans was tried separately; Truett was the principal witness against Evans, describing in detail the murders; Williams did not testify; an inculpatory statement made by Williams to another inmate was admitted into evidence through the inmate witness. 400 U.S. at 77-78. Evans made a "*per se*" argument similar to the one Lilly has made, and relied on several of the cases Lilly relies on for his "*per se* error" argument: Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Bruton v. United States, 391 U.S. 123 (1968). See Dutton, 400 U.S. at 83-84. This Court carefully distinguished each case: Pointer involved the use at trial of the transcript of the robbery victim's preliminary hearing testimony, the robbery victim was the chief witness and Pointer had no counsel representing him at the preliminary hearing; Douglas involved the "flagrant violation" of allowing the prosecutor to read the accomplice's confession under the guise of refreshing the accomplice's recollection even after he had refused to testify under the Fifth Amendment; and Bruton involved the question of whether a jury in a ***joint*** trial could follow instructions to disregard admittedly inadmissible, albeit fully presented, hearsay evidence of the co-defendant's confession. Indeed, this Court noted that "[t]here was not before us in Bruton 'any recognized

exception to the hearsay rule,'" and the Court was careful to emphasize that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." Dutton, 400 U.S. at 84-86, quoting Bruton, 391 U.S. at 128 n.3.

The particular hearsay exception at issue in Dutton was for declarations of co-conspirators and this Court approved the admission of the hearsay despite the fact that the Georgia exception was broader than the exception for co-conspirator statements under the federal rules. 400 U.S. at 83. This Court found the hearsay constitutional because the facts of the particular case and the context of the hearsay among all the other evidence in the case demonstrated its reliability. Id. at 87-89. Significant among the factors indicating reliability, moreover, was the fact that the hearsay was against the penal interest of the declarant. Id. at 89.

Of course, contrary to Lilly's erroneous exaggeration that no court ever has admitted such evidence, many courts have in fact found admissible the type of hearsay admitted in Lilly's case. See, e.g., United States v. Workman, 860 F.2d 140 (4th Cir. 1988); United States v. Smith, 792 F.2d 441 (4th Cir. 1986); United States v. Keltner, 147 F.3d 662 (8th Cir. 1998); United States v. Taggart, 944 F.2d 837 (11th Cir. 1991); Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996); Oregon v. Neilsen, 853 P.2d 256 (Or. 1993).

The simple fact is that, despite Lilly's isolating from this Court's cases those passages which question the reliability of co-defendants' confessions as a ***general*** matter, the law governing the admissibility of such hearsay evidence is settled. The lower courts, including the Virginia Supreme Court, know that care must be taken with such evidence to assure its reliability. That principle, however, never has ***prohibited*** such evidence as a matter of law; rather, each case must be determined on its own facts. Lilly's argument thus is inappropriate for certiorari review. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) (certiorari inappropriate merely to review application of existing precedent to facts); United States v. Johnston, 268 U.S. 220, 227 (1925) (same).

IV. THE "INDICIA OF RELIABILITY" FOUND TO SUPPORT THE ADMISSION OF MARK LILLY'S STATEMENTS ARE FACTUAL MATTERS NOT APPROPRIATE FOR CERTIORARI REVIEW. (Pet. Arg. C)

Lilly's last argument is that Mark Lilly's pretrial statements could not be believed due to perceived inconsistencies between the statements and other evidence, and based upon Mark Lilly's post-trial recantation.[5] Lilly's arguments were made in the trial court and in the Virginia Supreme Court. The two state courts rejected Lilly's arguments, however, because the evidence, facts and circumstances of this particular case, including the audio taped recordings and transcripts of the taped recordings, demonstrated that Mark Lilly's statements were reliable and trustworthy.

This Court has stated that the reliability determination for hearsay evidence is a "fact-intensive inquiry." Williamson, 512 U.S. at 604; see also id. at 621 (Kennedy, J., concurring) ("a difficult, factbound determination"). See also California v. Green, 399 U.S. 149, 168-169 (1970) (remand of hearsay issue to state court because "[i]ts resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses"). Lower federal courts recognize this principle by their application of a "clearly erroneous" standard of review to a "finding of the trial judge on the guarantees of trustworthiness" of hearsay. Workman, 860 F.2d at 144. The Virginia Supreme Court employs a

[5] Lilly's reliance on his brother's post-sentencing hearing testimony in which his brother said he had lied to the officers, may not be considered now because it obviously could not have been considered at the time the trial court ruled upon the admissibility of the statements. In any event, it certainly does not undermine the reliability of the original statements. Mark's "recantation" not only was thoroughly impeached by his admission that he had decided to testify only ***after*** he had been sentenced, ***after*** his family had blamed him for his brother's conviction and ***after*** his mother had filed in court to take away custody of his child (JA 3101-3102), but also by the fact that the "recantation" neither exonerated his brother in the murder of Alexander DeFilippis nor even purported to identify the triggerman. (JA 3102-3103). Significantly, Mark's implausible "recantation" did not persuade the trial court or the Virginia Supreme Court to set aside the jury's verdict.

similar standard of review: a reliability determination lies within "the sound discretion of the trial court, to be determined upon the facts and circumstances of each case." Ellison, 219 Va. at 408, 247 S.E.2d at 688; see also Williamson, 512 U.S. at 621 (Kennedy, J., concurring) ("District judges, who are close to the facts and far better able to evaluate the various circumstances than an appellate court, therefore must be given wide discretion to examine a particular statement....").

This Court does not sit to review or redetermine facts. See Sup. Ct. R. 10; Kyles v. Whitley, 514 U.S. 419, 458 (1995) (Scalia, J., dissenting) ("an intensively fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original). Lilly's fact-bound "reliability" argument, however, asks this Court to do just that. This Court should refuse to redecide the factual findings of the two lower courts. See Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 318 n.5 (1985) (factual findings by the trial court upheld by the appellate court should not be reviewed under the "two court" rule).

In any event, the two lower state courts properly determined that Mark Lilly's statements were reliable. This Court stated in Williamson that "the very fact that a statement is genuinely self-inculpatory...is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible." 512 U.S. at 605. Contrary to Lilly's repeated assertion that Mark denied any criminal liability and tried to cast blame on his brother, the transcripts of Mark's two interviews with the officers discredit Lilly's assertions.

First, Mark's statements given to Officers Price, Hamlin and Fleet obviously subjected him to criminal liability and, therefore, were against his penal interest. (JA 2253-2282, 2318-2332). The officers expressly warned him before each statement that what he said ***would*** be used against him if charges were brought. (JA 2255, 2318). Mark not only admitted that he participated in the Saunders break-in, that he went along with Alex's abduction, stood by while the murder occurred and participated in the subsequent two "getaway" robberies, but he also told

the officers that ***he knew his statements to them would result in charges of robbery and murder***, both of which carried possible life sentences. (JA 2281, 2324).[6] There can be no question about the fact that Mark Lilly knew his statements were against his penal interest.[7]

Second, although Lilly contends that Mark made statements which were internally inconsistent or contradictory to Gary Barker's testimony, the inconsistencies were on essentially minor points: what Mark stole in the break-in and whether he got out of the car at the murder scene. Petitioner's complaints about inconsistencies, moreover, were matters which could have been, and in many instances were, pointed out to the jury. (JA 2734-2737, 2746, 2748). The hearsay that may be admitted without violating the defendant's confrontation rights is that which is sufficient "to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" Roberts, 448 U.S. at 65-66. Lilly's jury, which had seen and heard the tape-recorded police interviews, had a sufficient basis upon which to determine whether Mark was telling the truth. The statements, therefore, met the threshold "reliability" precondition to admission into evidence. See United States v. Shaw, 69 F.3d 1249, 1253 (4th Cir. 1995) ("this trustworthiness requirement – which serves as a surrogate for the defendant's in-court cross-examination – is

[6] Lilly inaccurately states that the officers threatened Mark with particular sentences. The only discussion of what charges would be brought was in response to Mark's question. Officer Price told him only that he would be charged with two armed robberies in his county; the officer did not discuss sentences at all and told Mark he did not know what charges from other counties would be brought. (JA 2281).

[7] To the extent Lilly argues that Mark's statements should have been separated out or categorized as to whether each phase was inculpatory or collateral-to-inculpatory, as this Court found must be done under FRE 804(b)(3), see Williamson v. United States, his argument presents no federal constitutional issue. This Court made clear in Williamson that it was not deciding any constitutional issue, 512 U.S. at 605, and further made clear that Congress was free to draft a rule of evidence allowing hearsay statements which are collateral to the actual inculpatory statements against penal interest. Id. at 600. Virginia follows the common law rule that allows in the declarant's entire statement containing declarations against penal interest if the entire statement is found to be reliable. See id., 512 U.S. at 615 (Kennedy, J., concurring) ("From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.") (quoting Jefferson, 58 Harv. L. Rev. 1, 57 (1944)).

satisfied if the court can conclude that cross-examination would be of 'marginal utility'") (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)).

Third, the fact that the statements were given voluntarily, after Miranda warnings, to law enforcement officers who tape-recorded them in formal interviews indicates their reliability because Mark surely knew that the officers could and would verify his statements with the surviving victim-witnesses as well as with Gary Barker and the defendant. See United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978) (declarant's interest in gaining favor with the officers "gave him every incentive to be extremely accurate in his reports" because he knew the officers would seek to corroborate and verify his reports).[8] The transcripts of Mark's statements disclose that the officers made no threats or promises to Mark. The officers, moreover, all were available at trial for cross-examination.

Fourth, the fact that Mark's statements implicated his own brother as the shooter, as opposed to Gary Barker, certainly is a strong indication of their reliability. (JA 2265-2266: in response to Officer Price's request to tell him who did the shooting, Mark stated, "Well, it's kinda hard cause he's my fucking brother man"; JA 2323: in response to Officer Hamlin's statement that they were trying to find out what happened to the murder victim, Mark said, "Yeah. Yeah, Man, something else, too. I'm going to be getting all these charges and that's my brother I'm telling on.").

Fifth, the fact that Mark's statements were corroborated on every material point by the trial testimony of Gary Barker (JA 2025-2150) and the other evidence in the case also demonstrates their trustworthiness. ***And yet another indication of the reliability of Mark Lilly's statements is the fact that neither Gary Barker nor the petitioner, to this day, ever has claimed that Mark was***

[8] Officer Price cautioned Mark to be truthful and take responsibility for his actions because if he did not, the court would not look at the confession "as it should." (JA 2257).

the shooter or even that Mark was in any manner more culpable than he had indicated in his pretrial statements.

Unlike the circumstances in Lee v. Illinois, where the co-defendant was reluctant to talk to the police until after he had been told that Lee had implicated him in the crime and that Lee wanted to "share the rap" with her, 476 U.S. at 544, Mark Lilly willingly and voluntarily told the officers what had happened shortly after his arrest. The officers never accused Mark of being the shooter and, for the most part, merely asked what had happened.

Unlike the circumstances in Douglas where the only direct evidence against the defendant was the confession of his co-defendant and where the prosecutor clearly engaged in misconduct, 380 U.S. at 416-417, Mark Lilly's statements were merely corroborative of the extensive testimony given by Gary Barker and the other evidence in the case, and ***no*** prosecutorial misconduct occurred. Unlike the circumstances in Pointer where the victim's hearsay again was the primary evidence against the defendant and where the defendant had been unrepresented by counsel at the preliminary hearing and thus had been unable to cross-examine the victim, Mark Lilly's statements were not the primary evidence and were in fact shown to be reliable by the circumstances of the interviews, by the statements themselves and by the corroborating evidence.

Indeed, unlike the typical co-defendant case in which one turns on the other for retribution or to gain favor with, or better treatment from, the authorities, here the record contains no such indications of untrustworthiness. Mark Lilly told the officers the truth about his own actions ***and only reluctantly described the actions of his brother***. Mark in fact refused to testify against his brother. He agreed to testify only after the trial was over and after his own family had blamed him for his brother's conviction. Even then, he only generally disclaimed his prior confession, refusing to change any material details. Mark's post-trial "recantation" was not believed by the judge who saw him testify. His statements given shortly after the crime spree are replete with indicia of their

reliability and the state courts violated no constitutional rule in allowing those statements into evidence.

V. THE "SPLIT" IN THE CIRCUIT COURTS OF APPEALS OVER THE USE OF CORROBORATING EVIDENCE INVOLVES NO CONSTITUTIONAL ISSUE RELEVANT TO LILLY'S CASE. (Pet. Arg. C(2))

Lilly's "split" argument is a confusing misreading of this Court's decisions in Idaho v. Wright and Williamson v. United States. Lilly actually makes two mutually exclusive arguments: (1) Idaho v. Wright allegedly barred the rule which the Virginia Supreme Court and other courts employ that before a hearsay statement against penal interest may come into evidence, it must be independently corroborated by other evidence and, thus, the Virginia Supreme Court erred under Wright when it found that independent evidence corroborated Mark Lilly's statements; and (2) there is a "split" in the lower courts on the issue of whether corroborative evidence may be considered. Obviously, if this Court already has decided the issue, as is contended by Lilly, then there can be no "split" of authority on the issue.

In fact, however, the "split" which Lilly has referenced does not even pertain to Lilly's case. Lilly states that "[i]n Williamson, this Court noted that the Courts of Appeal [sic] are divided regarding the use of corroborating evidence to establish a statement's reliability." (Pet. 29). Lilly, however, simply has misread the opinion. What Williamson noted was that some Courts of Appeals have read the second sentence of FRE 804(b)(3) to require corroboration for statements ***inculpating*** the accused, as opposed to ones ***exculpating*** the accused. 512 U.S. at 605. That "split" of authority over the statutory construction of a federal rule of evidence implicates no constitutional matter. Indeed, Williamson expressly disavowed a constitutional basis for its decision. Id.

Lilly's real argument is that the Virginia Supreme Court did not follow what Lilly perceives to be a requirement in Wright: that it was prohibited from considering the evidence

corroborating Mark Lilly's statements when it found the statements to be reliable. Lilly, however, never voiced this concern to the Virginia Supreme Court until he filed his petition for rehearing and, for the reasons stated above, that untimely argument could not have been considered by the Virginia Supreme Court, and it, therefore, may not be considered now.

In any event, Lilly's argument presents no "compelling" reason to grant certiorari. In Wright, this Court was faced with a different issue than the one in Lilly's case. In Wright, the Idaho Supreme Court had found that a 2 ½ year-old child's statements of sexual abuse given to an examining physician lacked the particiuarlized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause. 497 U.S. at 813. The statements had been admitted at trial under Idaho's "residual" hearsay exception. The Idaho Supreme Court found that the statements were unreliable because the physician had not tape-recorded them, had asked leading questions and had a preconceived idea of what the child should say. Id. at 812-813.

In affirming the Idaho court's decision, this Court rejected the government's argument that evidence independent of the physician's interview demonstrated the reliability of the little girl's statements: the 5-year-old sister's similar claims of sexual abuse and physical evidence of abuse. Id. at 824. In so doing, the Court noted the particular danger in relying on independent evidence in child sex-abuse cases, e.g., physical evidence which does not necessarily identify the perpetrator. Id.

The Court in Wright did ***not*** hold that its "no corroborative evidence" ruling applied to all hearsay exceptions, much less to declarations against penal interest and, indeed, its decision in Williamson four years later gave some indication that the Wright ruling is ***not*** required under the Constitution in cases involving the hearsay exception for declarations against penal interest.[9] In Williamson, the Court declined to decide the constitutional confrontation issue presented, but equated a determination of whether a statement is self-inculpatory under FRE 804(b)(3) with a

[9] The majority opinions in Wright and Williamson both were authored by Justice O'Connor.

determination of whether a statement is reliable under the Constitution. 512 U.S. at 605. In the very next sentence, the Court noted that the Courts of Appeals are split over whether FRE 804(b)(3) ***requires*** a finding that corroborating evidence supports a hearsay statement under the penal interest exception, but found it unnecessary to resolve the split. Id.

Such a split, of course, would not need resolution at all if, as Lilly argues, Wright already had pronounced a binding constitutional rule. In other words, Lilly's attempt to extend Wright beyond its own facts and beyond the hearsay exception discussed therein, simply has no basis in this Court's decisions. If Wright swept as broadly as Lilly argues, then the Court could not have referred, as it did later in Williamson, to a "split" over the use of corroborative evidence under FRE 804(b)(3).

Moreover, the principles which supported the "no corroborative evidence" rule in Wright simply do not make sense in the context of the "declaration against penal interest" exception. In Wright, the very circumstances of the interview demonstrated the unreliability of the child's statements. In Lilly's case, and other "against penal interest" cases, the first element of the exception requires a finding that the statement itself is genuinely self-inculpatory and known to be so by the declarant; thus, it is the circumstance surrounding the statement itself that establishes reliability, not corroborative evidence. The additional ***requirement*** of corroboration[10] only enhances that reliability determination; it does ***not*** replace it, as was argued for (and rejected) under the different circumstances in Wright.

Consequently, Lilly simply is wrong when he asserts that Wright required courts to disregard corroborative evidence when considering statements against penal interest. He also is

[10] As shown above, Virginia has three requirements for admission of statements against penal interest: (1) unavailable witness; (2) truly inculpatory statement; and (3) reliability. It is only ***after*** a demonstration that the statement inculpates the declarant – a demonstration which this Court held makes the statement reliable, Williamson, 512 U.S. at 605 – that Virginia then ***additionally*** requires something "substantial other than the bare confession to connect the declarant with the crime." Morris, 229 Va. at 147, 326 S.E.2d at 694. This additional requirement is ***more*** than the federal rule of evidence or the Constitution requires.

wrong when he asserts that there is a "split" of authority that can have any relevance to the constitutional requirements for the admission of hearsay evidence in his case. Lilly's "no corroboration" argument demonstrates only his own misreading of the settled law governing the admission of hearsay; this Court should not grant certiorari merely to explain these already-decided principles.

VI. CERTIORARI SHOULD NOT BE GRANTED BECAUSE EVEN IF ERROR OCCURRED IT WAS HARMLESS.

Lilly's arguments present no compelling reason to grant certiorari because they were not properly preserved and involve only claims of misapplication of settled law to particular facts. However, even if an error had occurred, it would have been harmless in this case. See Lee, 476 U.S. at 547 (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against [the defendant]"). Here, there is no credible argument that the other evidence in the case did not overwhelmingly prove that petitioner committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA 2254-2282, 2318-2332).

It was the petitioner's car that was used in the initial part of the crime spree and the petitioner's car that broke down, necessitating his abduction of DeFilippis and theft of his automobile. When he was apprehended wielding a shotgun, the petitioner lied to the police officers about his identity and that of his accomplices. Petitioner made incriminating statements: at the arrest site, petitioner called to his brother Mark in the woods to give himself up because Mark was "not the one who has done anything wrong;" in the police car, the petitioner asked Officer Whitsett to kill him and, when the officer asked what a murderer looked like, Lilly said "me." A forensic examination of the accomplices' clothing found blood on the petitioner's pants leg, yet no blood on

Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that Lilly's guilt was established by overwhelming evidence independent of the hearsay statements. The admission of the hearsay, even if erroneous, thus was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

RESPONDENT'S APPENDIX

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Q. And what was going on at school right then?

A. Final exams were just about to occur.

Q. And after you, where were you all living?

A. We were living in College Park.

Q. And where did, where did you have to go to get the notes?

A. Over to Hethwood.

Q. And what were your plans after that?

A. Alex and I were going to go to the library to study and study up and get ready for our exams.

Q. How long had Alexander had the car at school?

A. Ah, since the summer before that, I believe.

Q. Do you recall how Alex was dressed?

A. Yes. He was wearing a, ah, a dark sweater, jeans and a, a black leather coat.

Q. Did he wear glasses?

A. Yes, he did.

Q. Did he have them on that night?

A. Yes.

Q. Did he wear a watch?

A. Yes.

Q. Do you know if he had any money on him?

A. Ah, probably less than Ten ($10.00) Dollars.

Q. And how old was Alex?

A. Alex was twenty-two (22).

Q. And what was he majoring in, if you know?

A. He was majoring in environmental science.

Q. And do you know what he was planning to do for break after the exams?

A. Just spend time with his family and maybe go over to Italy and spend time with his family over there.

Q. So you left College Park?

A. Correct.

Q. Drove across Blacksburg?

A. Yes.

Q. About what time was this?

A. Approximately 7:00.

Q. At night?

A. Yes.

Q. And where did you go?

A. We went to Hethwood Express. It's a convenience store.

Q. Where did you go before that? I'm sorry.

A. I'm sorry. We went to a friend's house to receive the notes.

Q. Was that an apartment in Foxridge?

A. Yes, it was.

Q. And for the record, was that in the Town of Blacksburg?

A. Yes, sir.

Q. You got the notes? Correct?

A. Correct.

Q. And then you drove to the convenience store?

A. Yes, sir.

Q. And what happened after you got to the convenience store?

A. Ah, I, I went into the convenience store

and my attention was directed outside and the car was gone.

Q. Was Alex around?

A. No, he wasn't.

Q. Did you have anything else in the car of your own at the time?

A. Yes, I had my book bag and some of my books.

Q. And what did you do after you saw that Alex wasn't out there?

A. Ah, I, I, waited around for a little while to make sure he just didn't go off and then I called out, out to his cousin's, Vinicio Ingrao.

Q. And then what did you do?

A. We talked and I thought that, ah, we talked and I thought that maybe Alex might have, had gone back for something, but it turned out that he hadn't been there, so, it, I, I noticed a car.

Q. There was a car?

A. Yes, there was a car parked illegally on another, on the other side of the street and it looked

abandoned.

Q. Do you recall if the car was there when you pulled in?

A. Yes, it was there.

Q. Do you recall if there was anyone around at that time?

A. No, sir.

Q. And what did you do after you saw the car on the roadway?

A. I went over to look at the, to see if it had license plate numbers.

Q. And did it have any license plates?

A. No, sir.

Q. And after you saw that, what did you do?

A. I dialed 911.

Q. To which Police Department?

A. Ah, the Blacksburg Police Department.

Q. And did officers come?

A. Yes, sir.

Q. About what time was that?

A. Ah, about approximately 7:20, I think.

Q. And you reported to them what happened?

A. Yes, I did.

Q. Somebody drew your attention outside?

A. Yes.

Q. Did you know that person?

A. No, I didn't.

Q. Did the person tell you their name?

A. No.

Q. Was the person still around when the police came?

A. No, sir.

Q. Let me show you this, Tom. It's a green and brown leather Jantzen's Sport Backpack. Do you recognize that?

A. Yes, I do.

Q. Have you seen it since that day before today?

A. No, sir, I haven't.

Q. Now, do you recall the kind of car Alexander had?

A. I believe he had a Plymouth, K-car.

Q. Fancy one?

A. No, sir.

Q. I show you this photograph of a vehicle in a parking lot that was taken December the 6th, of 1995, and the Giles County Sheriff's Office, and for the record, Your Honor, we have stipulated that these photographs are accurate as to what they portray.

THE COURT: All right, sir.

Q. Do you recognize that car?

A. Yes, sir, it's Alex's car.

Q. Now, there's no hubcap on the passenger front, right front, and it looks like there might be something wrong with the wheel?

A. Yes.

Q. Do you know anything about that?

A. Before Alex and I got, made, made it to the convenience store, we made a wrong turn, and it was a rainy night and, ah, as we were turning, ah, to get back onto to the road that we had previously come from, we hit the curb and I think the alignment was out of whack after that.

Q. And what did Alex do when you went into the store?

A. Ah, Alex got out of the car and, to check and see if, to see if his wheel was flat or to see if his tire was flat and if, and if his alignment was straight or not.

Q. So, the last time you saw him was going to look at the tire?

A. Yes.

Q. I show you two (2) more photographs. These were taken on the night of December the 5th at the Hethwood Express or in that vicinity. I believe it's Huntington and Lane and Heather Drive. Okay. And what is that a photograph of?

A. That's the car that I saw from the convenience store that didn't have the plates on it.

Q. And this is the Hethwood Express with the lights behind it?

A. Yes, sir.

Q. And that's a further picture of the vehicle?

A. Yes.

Q. And was your, was Mr. Nolen there also?

A. Yes, he was.

Q. When did you know that Benjamin Lilly and the other two (2) were at your residence?

A. Well, do you, you're asking for a time?

Q. Yes. Was it day, night?

A. Oh, it was in the night. It was approximately around 7:30 at night.

Q. And how did you come to know that they were there at your residence?

A. Ah, I was asleep in the bed and I heard voices, so I got up.

Q. Okay. And where was everyone?

A. They were in the living room.

Q. And was that Mr. Nolen and Benjamin Lilly, Mark Lilly and the one they introduced as Gary Barker?

A. Yes, sir.

Q. And what were they doing?

A. Ah, they had some guns in the living room and was showing them to Warren.

Q. Okay. Now, by they, do you recall who had what gun or were they laying down or did anybody hold them?

A. Ah, Mark had, ah, I don't know the difference in guns. It's just a long gun, I don't know, and the hand pistol. There was two (2) long guns and a hand pistol.

Q. Did, did someone else have the other long gun? Do you recall?

A. I mean, ah, it's been so long. I'm not, I'm not sure.

Q. But there were two (2) long guns?

A. Uh-huh. Uh-huh.

Q. Did they have anything else with them?

A. Yes, sir.

Q. And what else did they have with them?

A. Ah, they had some old coins. Ah, a money clip. I'm not exactly sure what else was, I think that was all because I seen the bag that they had dumped out into the floor.

Q. They had some kind of bag?

A. Yeah, it was in a brown paper bag.

Q. Did they have anything to drink?

A. Yes, sir.

Q. And what did they have? Well, I mean was, did, what type of liquid was it?

A. Let me, goodness, there was different kinds. There was Jim Beam, Canadian Mist, ah, probably Jack Daniels and Bicardi Rum. There was several bottles.

Q. At least four (4) bottles?

A. Yeah.

Q. Were they small bottles, large bottles?

A. They were large bottles.

Q. And they weren't yours or Mr. Nolen's as far as you knew?

A. No, sir.

Q. And after you came into the living room and, and saw them, what happened?

A. I, well, the coins wasn't in the living room at that time.

Q. Okay. Well, tell me what happened when you went out to the see guns? And saw the guns?

A. Ah, I saw them, I started fussing because I know that Warren is not supposed to be around guns and he told me not to worry about it that they were taking their guns out right then, so I got me a drink, a drink of water and went back to the bedroom to put some clothes on.

Q. All right. Did you go back to the living room?

A. Yes.

Q. Were the guns there then?

A. No.

Q. Did you see who carried the guns out?

A. I know when I was going back to the bedroom Mark was gathering them up.

Q. Okay. And when you came back out, then what?

A. That's when Mark had a bag of coins that he had dumped out into the floor and was going through them and that's when, ah, there was a money clip laying there and he grabbed it up and said that that's mine. I want to keep that and he was just, they were just, him

and Gary was going through them and seeing who wanted what, you know, like dividing them up.

Q. Did you see Mr. Lilly take any of those items?

A. No, he was busy talking with Warren.

Q. How much longer did they stay?

A. Ah, it was approximately maybe twenty (20) minutes.

Q. And they left?

A. Yes.

Q. Do you know what they were driving at that point?

A. They were driving the car that I had sold Ben.

Q. The Cougar?

A. Uh-huh.

Q. Did they leave the paper bag or take it with them?

A. They took it with them.

Q. Did they put anything back in it?

A. They put the coins back in it.

Q. And was anyone else with him at the time?

A. His brother was with him and Gary Barker.

Q. Did you know his brother?

A. Yeah, I knowed his brother, but I didn't, that's the first time I ever met Gary.

Q. And do you remember which brother or what his brother's name was?

A. Mark.

Q. All right. And how did you know they had come to your residence?

A. How did I know? Oh, like, you know, he, he has come by several times.

Q. Okay. Did they knock on the door or were you outside?

A. No, they knocked on the door.

Q. And they came in?

A. Uh-huh.

Q. Did they have anything with them at that point?

A. Just, ah, some liquor.

Q. One (1) or more bottles?

A. Four (4) bottles.

Q. And what did they do after they came in?

A. Come in and set and talked, talked for a few minutes and then I got up to go to the bathroom and then when I come back they, through the trailer, that's when they had come in with the guns.

Q. Okay. Now, what kind of guns did you see?

A. A shotgun, a rifle, and a handgun.

Q. Now, was this an automatic handgun or a pistol revolver type handgun? If you recall.

A. I think it was a pistol type revolver. It's a, it's either a .32 or .38. I'm not for sure it's been so long ago.

Q. Okay. And where were these when you came back in the living room? Were they holding them? Were they on a table? On the floor?

A. Ah, they were laying on, us see, I think two (2), the rifle and the shotgun was laying on the couch.

Q. And where was the pistol at that point?

A. Us see. I'm not really for sure which one

(1) had the pistol in their hand.

Q. Okay. When you came back in, was there any discussion about the guns?

A. Yes, I told them to get them out of my house because I was a convicted felon.

Q. All right. And did they move them out of the house?

A. Yes.

Q. Who moved them out of the house?

A. Ah, I think, Mark took them out of the house.

Q. Now, before this when they were just sitting around and talking before the guns showed up, were they drinking any thing?

A. Yes, sir.

Q. From the bottles they had brought?

A. Yes, four (4) different fifths, different brands of liquor.

Q. All right. And then did they stay there after the guns were taken out of the trailer?

A. They probably stayed maybe fifteen (15),

A. Yes, I did.

Q. And that's the Ben Lilly you saw that night in the middle?

A. Yes, sir.

Q. And where did you see him?

A. He was in Cowboys.

Q. And about what time was this?

A. Approximately 6:00 p.m.

Q. Was he by himself or with anyone else?

A. No, he was with his younger brother, Mark, and Gary Barker or Barkley or -

Q. Okay. Did you know either his younger brother, Mark, or Gary Barker?

A. Yes, his, his younger brother, Mark, had worked for our construction company for about two (2) or three (3) months prior to the, that night.

Q. So, it was Mark Lilly you knew?

A. Mark Lilly I knew.

Q. And how did you come in contact with them?

A. Well, I, I was sitting in Cowboys and there was two (2) other people in there. There was the

bar tender and another person and the three (3) of them came in together all at one time and then Mark Lilly, of course, knowing me through work, asked me to come outside he wanted to show me something. So, I, I, walked out the door with him and approached the car that they were in. He says, go ahead and get in on the other side. I want to show you something. So, I got in the car and, and he reached like this (describing) and pulled out a .38 pistol and asked me if I wanted to buy it and I said, well, let me see it. So, he handed the pistol to me and I looked at it, and I says, how much do you want for it, and he says, a Hundred and Fifty ($150.00) Dollars, and, I said, well, I don't have a Hundred and Fifty ($150.00) Dollars, and he says, well, give, give me a hundred (100), that'll, that'll do, and I said, well, no, I asked him, I thought for a minute. While I was examining the gun, I had emptied the bullets out of the chamber and I hadn't noticed that there was one (1) bullet at that time missing out of the chamber and I had asked Mark if, if, in fact, the gun was hot, in other words, stolen, and he said, he waited for a little, a few seconds, and he says,

well, it's warm. And I said, Mark, is the gun hot? He said, yes, at which time I handed the gun back to him. I put the bullets back into the chamber and handed it back to him and about that time both Gary Barker and Benjamin Lilly came out and approached the car and at that time, I remember Gary reaching in the back seat and pulling out a 12 gauge shotgun and, ah, Ben Lilly was right behind him or close, close there with him, and Ben Lilly said, put the, the God damn guns away, and that's pretty much all I remember the guns being put into the trunk of the car. I got out of the car and went back into Cowboys and they weren't there very much longer.

Q. Did they come back into Cowboys?

A. I don't believe so.

Q. So, you saw a shotgun and a pistol?

A. Yes, sir.

Q. And you said you unloaded the gun and it was a revolver?

A. Yes, sir.

Q. And then reloaded it?

A. I reloaded it, yes.

A. Mark was in possession of the pistol and Gary had the shotgun out at which time Ben grabbed the shotgun from Gary.

Q. Do you know if he grabbed a pistol from Mark?

A. I can't, I can't say -

Q. Okay.

A. For sure.

Q. But he did have possession of the, the shotgun?

A. The shotgun, yes.

Q. Now, could it have been a 16 gauge shotgun and not a 12 gauge shotgun?

A. I don't believe so because from what I remember, I, I remember the, the pump action.

Q. All right. And it was a pump action shotgun, is that correct?

A. Right, yes.

Q. And Mr. Lilly took it back and, and put it in the trunk, is that correct?

A. That's correct.

inside the car.

Q. All right. And when you got there where Officer Tilley was, did you see a vehicle besides his?

A. Yes, I did.

Q. And where was that?

A. It was facing the direction in which we were travelling. In other words, it was coming toward us. It was on the side of the road. Had pulled off of the travelled portion of the highway and stopped.

Q. All right. And how far away was the person walking to Officer Tilley when you got there?

A. The -

Q. From the car.

A. From the car. He had parked his car maybe twenty yards, fifteen yards from, from the parked car and the subject was probably half way between the two vehicles some ten yards, ten or twelve yards.

Q. All right. Was this person walking normally or had they, were they in any particularly kind of stance or had their hands -

A. No, he was approaching with his hands up.

Mr. Tilley had a weapon drawn on the subject.

Q. All right. And what happened as he got to Officer Tilley's car?

A. As he came to the car, that's about the time I arrived. We took the subject to the rear of the car, Randy Tilley's car, placed him on the ground and, ah, searched him for weapons and handcuffed him and then placed him in Officer Tilley's vehicle.

Q. All right. And who was that person that was walking towards Officer Tilley's car?

A. He was identified as Benjamin Lilly.

Q. And do you see him in the Courtroom?

A. I do.

Q. And would you point him out, please?

A. Sitting between Max Jenkins and Christopher Tuck to my right.

Q. All right. Now, did you assist in the search for weapons -

A. Of Mr. Lilly?

Q. Of Mr., yes.

A. I think I, I covered Officer Tilley while

he patted him down and handcuffed him.

Q. All right. Do you know if a knife was removed from him?

A. It was. It was taken from Mr. Ben Lilly's, one of his pants pockets.

Q. Was that turned over to your evidence technician, Mark Skidmore?

A. It was, yes.

Q. All right. Did Mr. Lilly say anything as he approached you all or as you got him to the back of the vehicle?

A. He was asked, I think he was asked how many other people were involved and, ah, or was with him and if they were armed. Officer Tilley also said that he observed two (2) people fleeing the vehicle in addition to Mr. Lilly.

Q. All right. And did Mr. Lilly tell you if there was anybody else with you, with him?

A. He told us that there were three (3) other people and that they had assault rifles.

Q. Did he give you names at that time?

A. He furnished some names to us, yes.

Q. All right. Do you recall what they were now?

A. The only name I can recall that he furnished was a Rader subject. Either a Mark or a Mike Rader.

Q. All right. And did Mr. Lilly say anything else to you at that time?

A. He indicated that he had been hitchhiking and these, these subjects had picked him up and also that he was working as an undercover officer for the Montgomery County Sheriff's Office.

Q. After he told you he was working undercover for the Sheriff's Office, did he ask you to do anything for him?

A. He indicated that if we would take the cuffs off that he would get us the name and number to call to check on it.

Q. And what did you and the other police officers then do after you had Mr. Lilly in the, Officer Tilley's car?

Interview With
Benjamin Lee Lilly

Interviewer: Lieutenant Gary Price
Date: December 6, 1995
Time: 3:55 AM

G.P. State your full name.

B.L. Benjamin Lee Lilly.

G.P. L*I*L*L*Y?

B.L. Yeah.

G.P. No "E" in it?

B.L. No.

G.P. What's your mailing address?

B.L. Post Office Box 217, Riner, Virginia 24149.

G.P. And your date of birth?

B.L. 2/29/ of '68

G.P. And your social security.

B.L. 230-96-7040.

G.P. Okay. Mr. Lilly, I'm an investigator for the Sheriff's Department here and I'm gonna ask you some questions about some things that transpired over the last forty-eight hours. Because the answers you give me may incriminate you in some criminal activity, I'm gonna advise you of the Miranda Warnings and the rights that you have, and I want you to listen to them very carefully. If you have any questions on any of them, I will try to explain them to you so that you fully understand them. You have the right to remain silent. That means you don't have to talk to me. I can't make you talk to me. Anything that you do tell me, I can and I will use against you in the court of law on any charges that are brought. You have the right to have your attorney with you while you're being questioned and if

you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements. In other words, if you have an attorney retained or whatever, family attorney, you have the right to have them here. If you can't afford one, then the court will appoint one to be with you. If you decide to waive these rights and talk to me and then somewhere along the way you wanna quit, you can quit at any time. Do you understand that?

B.L. **No Statement Made**

G.P. Okay, did you understand those rights?

B.L. **No Statement Made**

G.P. Alright listen to this part, this is equally important, having been advised and fully understanding my rights, do freely and voluntarily, without threats, promises, pressure or coercing agree to talk with Gary Price a law enforcement officer. If you answer my questions, you're doing it on your own free will. I can't make you, I can't force you, and I'm not gonna trick you. Are you willing to answer some questions concerning your activities and those activities of Mark Lilly, your brother, and Gary Barker, a friend of yours, over the last forty-eight, twenty-four hours?

B.L. We'd been ah. . .

G.P. First of all, you willing to answer some questions concerning those?

B.L. **No Statement Made**

G.P. Get you to sign and date that. That states I read the rights and you're talking to me on your own free will.

B.L. You don't have any cigarettes with you do you?

G.P. No, I don't smoke and you got the same problem up here you had down stairs with those computers. I'll get you outta here and let you have another one here in a few minutes.

B.L. Today's date?

G.P. 12/6/95.

B.L. We'd been ah, drinking quite a bit of liquor over the last few days.

G.P. And when you say "we", who you talking about?

B.L. The three of us was, been drinking quite a bit of liquor of the last few days.

G.P. Talking about Gary Barker and Mark,

B.L. Yeah.

G.P. your brother?

B.L. Yeah.

G.P. Okay, go ahead.

B.L. Okay, we'd been, you know, drinking liquor over the last few days, you know. And then I get to where I drink so much I pass out, you know, black out and all that. So, you know, a lot of stuff, you know, is like, you know, I'd be at one place, we'd be drinking. So, you know, I'd pass out, and then when I come to, be somewhere else, or we on the road or something, you know. And then tonight I'd went up with them, they picked me up up there coming down Prices Fork Road, in the little car, they pick me up, and then, going toward West Virginia. We's gonna go over in there, got some kin people live over there. I said, "Well hell, stop here and I'd get some beer."

G.P. And when you say "stop here" where was you talking about?

B.L. There's a store, leave right off 460.

G.P. Here in our county, Giles County?

B.L. I think so.

G.P. Okay, go ahead.

B.L. Okay, and then, and I said "Hell, stop here," you know "I'll get some beer." So then they said "Alright." you know, and I went in there, and I went back to the cooler, you know, where the beer was at, cause it was in the back. I went back to the cooler and the next thing I

know, you know, here we come up in there and they got guns and shit, you know. And this old guy and old woman in there. The old woman had done run to the back of the store, and I told her, I said "Look, stay down" I said "God dam, stay down." I's going like this right here to them, I didn't know what the hell was going on myself, you know, I suppose to get some beer. And they come up in there running like that an shit, you know. I had a knife and I told them, I said "Look," you know, and I slung my knife and it stuck in the floor. And then I grabbed the knife and then I'd went up and then ah, Gary told me said, "Get that beer." I went like this right here, and the old guy, I seen it, he was sitting there at the dam, in between the counter and the wall and he hit it just like this right here, I didn't see no blood or nothing, right. I didn't here no shots fired or nothing so I know they didn't shot him, but I didn't know if they hit him or not, right. So then I seen him like this right here, and he was going like this right here, you know, just shaking all to hell an shit, right. And then Gary told said, "Get that beer." I went like this right here and then it's, he's heading out the door, and then I seen the man in the door like this right here, you know, he was pointing the gun at me then. So then, you know, I picked up about six beers and I had, I think it was a five dollar bill in my hand, and then I laid it down right there.

G.P. You said Gary had the gun, what kind of gun did he have?

B.L. I'm not for sure what it was, I just know it was a pistol.

G.P. It was a pistol rather than a rifle shot gun he had?

B.L. Yeah.

G.P. What kind of finish did it have? Blue? Chrome? Stainless Steel?

B.L. Just blue finishing, you know, just a regular pistol, you know, it wasn't nothing. . .

G.P. Who's gun is that?

B.L. I don't know.

G.P. Had you seen it earlier that night, or?

B.L. Huh uh, I hadn't seen that gun earlier that night, I seen the, I seen the rifle that he had had. And then ah, I'd seen it.

G.P. Okay.

B.L. And then ah, after that was over, I tried to get them to let me out, right. And then they came down to a place down here, the best I remember, it's next to a Dairy Queen, somewhere on the street where a Dairy Queen is.

G.P. That'd be in the town of Pembroke.

B.L. Yeah.

G.P. Are you familiar with Pembroke?

B.L. Not too much.

G.P. But you know that's where you were on the. . .

B.L. Yeah.

G.P. okay, go ahead.

B.L. Cause I go by there a lot, you know, going, you know, my kin people, a lot of my kin people live over in Summer's County, and I travel 460. We's there at a store and I's trying to get out before we got to the store, I said "Man, let me the fuck outta here, let me the fuck outta here." I said "I ain't in all this crazy shit." I said, "Let me the fuck outta here." Alright, then they, they whipped up in there, and they said "Look, you take off, we gonna shoot you." you know. And you know, someone who's drunk an shit, hard to tell what the hell they've been on an shit, you know, I didn't wanna take no chances, I sat there, you know. And then they had me up front, and I's setting there, next thing I know here comes a gun man. Said "You drive." And Mark said "What a minute, hold up." He says "Drive it." you know.

G.P. Now who said that to you?

B.L. Ah, it was both of them. "You drive it." you know.

G.P. Who had the gun in their hand?

B.L. I think ah, I think Mark had the gun in his hand that time.

G.P. Okay, and what happened after that.

B.L. I drove, shit. And then we was going down next to a dam river, they said get down to the river. I said "Hold on." you know, I didn't know the way to the place they call the "Sand bar." But anyway, it was next to, you go by a railroad and all that shit. So then ah, we went down there and then ah, wasn't long after that we's pulled over and all.

G.P. Pulled over by the police or?

B.L. Yeah.

G.P. Then what happened at that point?

B.L. They had took off running and then when I got out, I was eating a granola bar, you know, they've done scared the hell outta me, you know, I was, I'm trying to get straight, you know, so then I's trying to eat something. And then they ran, and then a cop, you know, he made me stick my hands up and shit like that right there, and I soon as I got up there, man, they started sticking guns in my head an shit, you know. I hadn't had a gun in my hand, no pistol or nothing, except for that sixteen gauge, and they got to playing with that an shit. And I unloaded it, and there was one shell left in it, and I put it in my pocket to keep them from getting it earlier on that evening. You know, cause I don't, I don't like fucking nobody playing around me drunk with guns, you know. That shit don't go, alcohol and guns and fucking women and all that shit, that shit don't go, you know. And that's the only thing I done wrong since I've been out, is handle that one sixteen gauge pump shotgun.

G.P. So then, when the police stopped you, you they put you, or stopped you and detained you, or whatever they done.

B.L. Yeah.

G.P. And the other two ran?

B.L. Yes.

G.P. Do you remember what you told the officers there who those people were that ran?

B.L. Just Gary Barker, Mark Lilly, and Mike Raider. Cause he was in there earlier that evening.

G.P. So you told police it was four people counting you?

B.L. Yeah.

G.P. And three of them ran, even though there was two of you?

B.L. Two?

G.P. Two other than you. And you're saying and you're still saying there was four people that ran?

B.L. It was four of us, I can't rem., it might'a just been that two that ran. Because I can't remember exactly where he got out at. I don't know if it was right after that second place down next to the sand bar or what. But I remember he, he jumped out.

G.P. Was the forth one with you when ya'll was over at the first store where the old man and woman were?

B.L. **No Statement Made**

G.P. So there was four there?

B.L. Yeah.

G.P. Did he go, who all went into the store?

B.L. I went into the store to buy the beer, and I went back to the beer cooler, right. I was headed back that way, I didn't make it all the way back there, and I had money on me and all, and then the next thing I know, you know, he, they coming up in there with guns and shit. They done scared the hell outta both the old people and all that shit. I'm trying to tell the woman, you know, she's sitting there, and she's done turned white as a sheet, sitting there like this right here, said "Don't get up, don't get up." you know, I didn't want them to shoot either one of them. You know, "Don't get up, stay there, stay there." and all that shit. And then I told the, I hollered, told them "Ya'll get the fuck outta here." And then. . .

G.P. Now what was this about, you said you had a knife, what was the story on the knife?

B.L. Alright, I had a knife on me, I said "Stay here, stay here." I said "Don't get up an shit." And I had a knife on me and I pulled the knife out and I said "Ya'll get the fuck outta here." and I had the knife in my hands and then I threw it and it stuck in the floor on the first isle up. I said "Ya'll get the fuck outta here." and then I pull, picked the knife up, pulled it out, closed it up and put it back in my pocket. And I was going up there, then that's when Gary told said "Get that rest that beer." I said "No man." And I was looking over there and I seen the old guy he was just shaking, I didn't see no blood or nothing so I don't figure they hit him, he's just sitting down in between the counter and the wall. And then the next. . .

G.P. And what all did they take outta there other than the beer?

B.L. I think they got a little bit of beer and ah, I think they got some chewing tobacco and shit like that.

G.P. Did they get any money that you know of?

B.L. Not as I know of, I didn't see no, see I bought a case of beer right up there on at McCoy in ah, from ah, it's right before you get to, you know where the New River Junction Store is?

G.P. Uh huh.

B.L. Alright it's right before you get there, you know, before you go down hill and make a right. Alright, it was off of ah, I can't think of the name of the store but there's usually an old woman that runs it. I went in there and there was a heavy set girl tonight.

G.P. And you bought a case of beer there?

B.L. I bought a case of beer and two packs of cigarettes.

G.P. Was it pretty crowded in there when you were there?

B.L. Oh, no.

G.P. Any other customers?

B.L. Ah, no I didn't really pay attention.

G.P. The knife that you pulled out at Eggleston, is this the knife?

B.L. That's it.

G.P. Okay. And you pulled it out and told your partners to get outta there. . .

B.L. Yeah.

G.P. and then you threw it and stuck it in the floor, what was the purpose of throwing it and sticking it in the floor?

B.L. I tried to throw it at them.

G.P. Throw it at your partners?

B.L. Yeah, cause I didn't, you know, I don't play that shit man. Get up in there and fucking with old people like that, make them have a heart attack or somethin like. They fucking die, and shit you're getting a fucking murder charge and all kinds of shit. You ain't even suppose to be doing no shit like that to begin with, you know what I'm talking about?

G.P. So what was the original purpose of stopping at that store?

B.L. To get beer.

G.P. Even though ya'll had just stopped and bought a case of beer earlier?

B.L. Yeah, because we was getting ready to go across the state line and all to go in West Virginia. I said "Well hell, let me get some more beer, and then we'll have enough to do us till tomorrow."

G.P. So ya'll didn't discuss prior to that, let's go in there and rob this store?

B.L. Hell no.

G.P. And up to that point you didn't know that he had a pistol?

B.L. Huh uh. And then I'd say "Hell no." you know. That, if they would've been talking shit like that, I'd been, shit. I'd tried my damdest to got away from them.

G.P. What time did you get with Gary and Mark that day, yesterday?

B.L. Ah, maybe around seven or eight, something like that, nine or something.

G.P. In the morning?

B.L. No, in the evening is when I got back with them.

G.P. Was you with them earlier in the day?

B.L. Yeah, yesterday morning I was with them.

G.P. What were ya'll doing then?

B.L. Just drinking a little bit, drinking a little bit of liquor and all.

G.P. Were you riding around or were you at somebody's house?

B.L. We were ah, at ah, a couple of trailer courts, I can't remember their names or nothing.

G.P. How were ya'll getting from place to place that day, yesterday?

B.L. Okay yesterday ah, some guy in a tan van from Blacksburg gave us a ride, him and his girlfriend. I rode around with them looking for some kind of a pregnancy crisis place or something.

G.P. So the guy in a tan van and his girlfriend, you and Mark and Gary, ya'll just riding around.

B.L. We was looking for that place cause she had an appointment there and we was all in Blacksburg trying to find it.

G.P. And then what did they do, they drop you off somewhere, and you got back with them later that evening?

B.L. Yeah.

G.P. What time they drop you off that day?

B.L. Maybe around about one-thirty, two o'clock something like that.

G.P. And then what time did you get back with them?

B.L. It was around about, maybe seven or eight.

G.P. Where'd they pick you up?

B.L. It's was on ah, Prices Fork Road.

G.P. At a residence?

B.L. No, I was hitchhiking.

G.P. They just come by and see you?

B.L. Yeah.

G.P. What were they driving then?

B.L. Some kind of little maroon car.

G.P. And then from there, that's when ya'll, who's car was it?

B.L. I'm not for sure.

G.P. You didn't ask them or anything?

B.L. No.

G.P. You ever seen it before?

B.L. Huh uh. But hell, them two boys they don't, shit, they fucking buy a car every other day or something. Shit they give a hundred dollars for a car and then run the hell out of it, you know. I just figured they just wanted to ride, you know.

G.P. Did you end up with any of the money out of the first robbery over where the old couple were?

B.L. No.

G.P. They didn't give you money whatsoever?

B.L. No. Number one I wasn't trying to be involved, you know. I just got out on parole. Course now. . .

G.P. You and Gary get along pretty good, or you and your brother get along pretty good?

B.L. Me and Gary get along alright. Me and my brother, you know it's, we're about ten years difference in the age and, you know, sometimes we get along, sometimes we don't, you know. But ah, if I wasn't (not understandable) all this shit I believe I'd been better off, I would've waited there with them two old people till the police got there, you know what I'm saying. Them fella's riding around with them earlier, God Dam, you know.

G.P. When you came into Giles, they picked you up hitchhiking and ya'll rode into Giles, who was driving the red car?

B.L. I'm thinking Mark was.

G.P. And who would've been up front passenger side?

B.L. Gary.

G.P. And you got into the back?

B.L. Yeah.

G.P. And when you left the first store over there, who was driving then?

B.L. Ah, Gary.

G.P. And you were in the back?

B.L. Yeah.

G.P. And then Mark was a passenger?

B.L. Yeah. See what happened, I jumped in the back, because then they kept hollering "Come on, an come on." And I was up there and I wanted to stay and make sure that they wasn't, you know, hurt or nothing. I was up there at the counter, Gary told me, said "Get the beer." I went like this right here, nodding my head, no. Next thing I know, you know, they still standing there dam guns waving and shit, you know. I didn't know if they was gonna shoot me

or not, I grabbed six beers and I had some money in my hand the I dropped it on the counter.

G.P. When ya'll left that area and you went to the second store, what was the purpose of stopping at the second store?

B.L. I'm not for sure, I was trying to get away from them.

G.P. Were they, had they discussed going in there and robbing it?

B.L. They didn't say a word, and then they'd stop, and then I was trying to figure out how the hell to get away from them. And there was two or three vehicles out there, there was trucks and shit I didn't think they was gonna do no crazy shit like that. All them vehicles and all, and I was trying to figure out how the hell to get away from them.

G.P. So them two went in a store, left you in the car. . .

B.L. Yeah. And then when they came back out then these, I got a fucking gun in my ears, you know.

G.P. And they told you to drive on?

B.L. Yeah.

G.P. As you was driving down back down toward the river road, you remember a shot being fired, or a car chasing you?

B.L. I remember somebody said, the car was chasing, getting away from them, and I wasn't, I was trying, you know.

G.P. You don't remember hearing a shot, though?

B.L. I was too dam scared.

G.P. Okay.

B.L. To be honest with you, I was too dam scared.

G.P. And just on down the road a little short piece where a car, where the police officers came up on you, you tell me that you stopped or did the car break down on you?

B.L. It had broke down.

G.P. Just plain quit running?

B.L. Yeah. Over heated or somethin.

G.P. What were ya'll doing at that time? Were you getting outta the car, were you just gonna stay with it, or?

B.L. I was sitting there, didn't know what the hell to do, and then about the time it broke down then the cop pulled up.

G.P. You got outta the car?

B.L. Yeah, I was getting out.

G.P. You were driving it that time?

B.L. Yeah.

G.P. Did you bring a shotgun out with you and then place it back in the car when you saw the officer?

B.L. No.

G.P. So if the officer said that when you got outta the car,

B.L. No ah, Gary grabbed the rifle, and I was saying "Wait a minute," I said "Man, that's a policeman and I setting here in a, unlicensed". Then the police hollering "Get the hell outta the mother fucker, get the hell outta that car mother fucker." And then I was eating a dam granola bar, and then when I got out then they fucking put guns to head and shit. And I told them, I said "Look man, I'm just eating something." I put my hands up like this right here, and then he said "Come here." I started going up there to where the lights was on the vehicle, and I started to get down, you know, to where the lights was, they said "No, I said come here." And then when I got there, then they slammed me to the ground, and I had all kinds of guns around my head.

G.P. The, was there a shotgun in the front seat where you were when you stopped and the police apprehended you?

B.L. I can't remember for sure, I can't remember, sir.

G.P. Anything else you wanna tell me?

B.L. No, I can't think of nothing.

G.P. Okay, interview will, let me ask you, have you at any time today fired a weapon or fired any, either the rifle, the pistol, or the shotgun?

B.L. No.

G.P. You didn't fire at anything today?

B.L. Huh uh.

G.P. Okay, interview will end at 4:17.

Transcribed by:

Christy Cumbee

A. He signed a written form, yes, sir.

Q. So, he was filling parts of it out as you were asking him those questions?

A. The only writing he would have done would have been the, where he put his signature at the bottom.

Q. All right. Now, you asked him if he fired a gun right at the end?

A. Yes, sir, I did.

Q. And after the tape was off, did you ask him to do anything or to check something about firing a gun?

A. I asked him if he would submit to a GSR Kit performed by the evidence tech to recover any powder residue that would have been on his hands.

Q. Okay.

A. The firing of any weapons normally leaves some powder residue on your hands.

Q. All right. Now, what do you mean by GSR. What does that stand for?

A. Gun shot residue.

Q. So, you would of had the evidence tech

come in?

A. Yes, sir. He would have conducted the test necessary to recover the residue.

Q. And when you asked Benjamin Lilly that, what did he do?

A. Mr. Lilly was handcuffed during the interview for the safety of, of the officer. Mr. Lilly begin rubbing his hands in this manner right here (describing with hands).

Q. Had he been doing that before?

A. I had not noticed him, no, sir.

Q. Now, Mr. Lilly you talked to I believe beginning about 3:55 in the morning or thereabouts? Whatever you indicated on the tape?

A. At 3:55 a.m.

Q. Let me go back to the scene now where the vehicle was found and you came in contact with Mr. Lilly. How much longer did you stay at the scene?

A. After Mr. Lilly was placed in the police car, probably ten to twenty minutes, within ten to twenty minutes, a second subject was located and brought to a

police car and he was transported, I'm talking about the second person, Mr. Barker was transported to the Sheriff's Office in my vehicle by myself.

Q. Okay. You took him back to the Sheriff's Office to begin with?

A. Yes, sir, I did.

Q. And did you have an interview with Mr. Barker?

A. Yes, sir, I did.

Q. And what was the general subject matter of the interview to begin with?

A. The two (2) armed robberies of our county and who participated.

Q. All right. Now, when you got back to the Sheriff's Office, did you learn anything about the maroon car that you had come upon on, with Mr. Lilly?

A. I was informed by our dispatchers that Blacksburg had inquired about a tag number we had run on the red car and that that particular vehicle had been reported stolen and the owner, or the driver abducted in their jurisdiction earlier that evening.

Q. Now, after you completed talking to Mr. Barker about the events in Giles County -

A. Yes.

Q. Did you bring up the subject of the car? The car they were found near -

A. I asked him whose car that was.

Q. And at that point, did you know what had happened to the owner of the vehicle, or the driver of that particular vehicle missing from Blacksburg?

A. No, I did not. I was aware that the car had been taken and the owner or operator had been abducted, but we did not know the welfare of the abducted subject at that time.

Q. And how did Mr. Barker react when you brought that subject up?

A. Became very emotional.

Q. Now, what do you mean by that? What did he do?

A. Got very excited. It seemed like he was crying or very near tears and indicated that a bad thing had happened.

and at that time Investigator Price had missed the road and I had gotten in front of him and was travelling down that road.

Q. All right. And where did you come in contact with another vehicle?

A. It was shortly, it was approximately I'd say a eighth of a mile, could be a eighth of mile down that road, I met the maroon vehicle coming towards me.

Q. Okay. Now, is this a straight stretch of road or a little curve, what is it?

A. It was, I was coming down a hill and he was coming around the curve and then it came into a straight stretch.

Q. All right. And you saw the vehicle moving?

A. Yes, sir.

Q. And then what happened?

A. And the vehicle was moving towards me and then it came to a stop, pulled off to the right-hand side of the roadway.

Q. All right. And were you still moving at

that point?

A. Yes, sir, I was still moving then I pulled my patrol car cross ways in the road -

Q. All right.

A. And stopped.

Q. Did you see any persons around the vehicle?

A. Yes, sir, two (2). The one (1) in the back and the driver, they jumped out of the vehicle and ran towards the rear of the vehicle.

Q. All right.

A. And the one (1) on the passenger's side exited the passenger's side of the vehicle.

Q. Okay. And then what happened?

A. He had, ah, it was a shotgun that appeared -

Q. Okay. Now, by he, who do you mean by he?

A. Ah, Mr. Lilly, Mr. Ben Lilly.

Q. All right. The gentlemn over there in the middle?

A. Yes, sir.

Q. And where did he come from?

A. He came out of the passenger's side front seat of the vehicle.

Q. All right. And then what happened?

A. He had the shotgun in his hands and he turned towards me and that's when I ordered him to put the shotgun down.

Q. And how did, how was he holding it?

A. He was holding it. He didn't have it up to shoulder. He just had it in his hands like that (describing).

Q. Sort of across?

A. Yes, sir.

Q. And you ordered him to place it down?

A. Yes, sir, I did.

Q. Did you -

A. Probably two (2) or three (3) times, I told him to put the shotgun down and he laid it back onto the front seat of the vehicle.

Q. All right. Was there, the door open at that point?

Christiansburg.

Q. And you went to that area?

A. Yes, I responded to Whitethorne.

Q. You were given a specific area to go to?

A. Yes, I was.

Q. And where exactly is Whitethorne located?

A. It's in the McCoy area of Montgomery County.

Q. And where was the area they asked you to go? Was it on a main road?

A. It was the main road to Whitethorne, which would have been the, leads into the property there that the Norfolk and Southern has.

Q. All right. And when you got there, did you stay on a state maintained road or did you go off onto private property?

A. I went off onto Norfolk and Southern property.

Q. You cross over railroad tracks I think?

A. I just crossed a concrete bridge with a creek under it.

Q. Okay. And as you pulled up, what did you see?

A. As I pulled up, I, I found a white male laying against some steel. The clothing that he had on was a pair of socks and his underwear.

Q. Did he have any visible injuries?

A. Yes, he did.

Q. Deputy, I'm going to show you Commonwealth's Exhibit Number Sixteen (16). Would you look at this, please? Is that the scene when you got there?

A. Yes, it was.

Q. And after you got there, what did you do?

A. After finding the gentleman, I notified my sergeant by radio that I had located him and upon his arrival, we secured the scene.

Q. Okay. How did you secure the scene?

A. We took yellow police tape and ran around the, ah, from where he was at around some of our vehicles to block off an area.

Q. All right. Now, these boxes are whatever

removed the body, if we needed to come back later and take measurements or anything like this, ah, I'd, I'd know where it was at that time.

Q. Okay. And a video tape was made before the body was moved?

A. Yes, sir.

Q. And were any still photographs taken?

A. Yes, sir, they were.

Q. And what was done to examine the secured area?

A. Basically just walking around. We lit it up, ah, and took some photographs and walked around looking. Ah, I couldn't find anything except for the blood and the body. I couldn't, couldn't see any other evidence there.

Q. And what was the weather that night?

A. Windy and cold.

Q. And what about ground conditions?

A. Ah, it was dry at that time. It, ah, I think it started snowing later the next day.

Q. All right. So, at that night other than

the body and the photographs and the video tape, there was no other evidence found to remove at that time?

A. Ah, no, sir.

Q. Okay. Chief, I show you Commonwealth's Exhibit Number Sixteen (16). Is that the scene as you found it when you got there?

A. Yes, sir.

Q. And there's some, it looks like strips of something on the ground there?

A. Yes, sir.

Q. And what are they?

A. Ah, that's where I had laid out where the blood zigzagged leading over to where the body was.

Q. Okay. So, that's about where it began is, is where we can see in the photograph?

A. Ah, yes, sir. The, the way the wind was blowing, that's the reason I marked it later. Some of this had got moved, but I think I got this before the, the wind had blowed, because it was going in a zigzagged and over and then into there like he was stagering before he fell.

(5)

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

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SUPREME COURT OF VIRGINIA

VIRGINIA STATE SUPREME COURT

CASE# 972385 CONSOLIDATED WITH CASE# 972386
BENJAMIN LEE LILLY
V.
COMMONWEALTH OF VIRGINIA

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02/20/98 REPLY BRIEF

**CIRCUIT COURT OF THE
COUNTY OF MONTGOMERY**

IN VIRGINIA:

**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY**

COMMONWEALTH OF VIRGINIA	)	
Plaintiff	)	**Motion In Limine**
v	)	(Filed Oct. 21, 1996)
BENJAMIN LILLY	)	
Defendant	)	

Comes Now the Defendant, Benjamin Lilly, by and through counsel, pursuant to the 6th, 8th, and 14th Amendments of the Constitution of the United States, and asks this Court for an order precluding the admission of the statements of Mark Lilly that were given to Investigator Gary Price of the Giles County Sheriff's office, should Mark Lilly be unavailable to testify, based on the following grounds;

1) Admission of said statements would violate the Defendant's sixth amendment, through the fourteenth amendment, right to cross-examine one of the alleged accomplishes [sic] about a purported confession. *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.

2) Admission of said statement would violate the Defendant's 6th 8th and 14th amendment rights because the statements that Mark Lilly gave would not conform to any hearsay exception, namely against his penal interest, because they are not reliable due to their self-serving

nature at crucial times of the confession such as the statements that he got into the victim's car because "I had to or get left man, I was so drunk." or when at the murder scene he stated that he never got out of the car, or when discussing the robberies in Giles he states that "they wanted to rob it, they figured that . . . " or when questioned about why he took beer from one store he stated "I was so drunk, I don't do that shit, you know if I am sober . . . ". *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.

3) Admission of said statement would violate the Defendant's 6th, 8th, and 14th, Amendment rights because the statements that Mark Lilly gave that may incriminate Benjamin Lilly would not conform to any hearsay exception, namely against penal interest, because the statements would not be against Mark Lilly's penal interest, but rather the Defendant's. *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.

/s/ Christopher A. Tuck
Benjamin Lilly by counsel

Certificate of Service

I, Christopher A. Tuck, do hereby certify that a true and correct copy of the above motion has been mailed and/or hand delivered to Phillip Keith, Commonwealth Attorney, Post Office Box 38, Christiansburg, Virginia, 24073, on this 20th day of October, 1996.

/s/ Christopher A. Tuck
Christopher A. Tuck

---

* * *

[773] well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and [774] Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything

wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is [775] another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if [776] the Court rules against us. That's why it's so important. We're talking about a

murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, –

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court [777] is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to

be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say [778] is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on –

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I –

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record *Douglas v. Alabama*, –

THE COURT: And that has already been submitted and reviewed by the Court –

MR. TUCK: I believe that's correct. *Brutan v. United States* –

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe *Crews v. New York*. I also believe I had submitted to the Court two other cases. That was an *Idaho v. Wright* and just to [779] briefly discuss

Idaho v. Wright, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned [780] specifically in the *Idaho v. Wright* that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the *Idaho case* because the *Idaho case* involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what

they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is [781] that the whole statement can come in. The Court has seen in the *Scaggs case* and the *Chandler case* which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U.S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by and unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the [782] confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where

their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against [783] self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you –

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the [784] points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving [785] statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

* * *

[787] Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and

thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the [788] hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

[789] MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court

would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on *Brady* I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did seize from Alexander V. Defilippis a 1986 Dodge Aries belonging to Ezio Defilippis with the intent to deprive Alexander V. Defilippis of possession of the automobile by means of the threat or presenting of a firearm; these acts constitute the crime of carjacking.

VA. CODE § 18.2-58.1.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while carjacking the automobile in possession of Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY, by force or intimidation, did seize, take and transport Alexander V. Defilippis with the intent to deprive him of his personal liberty without legal justification or excuse; these acts constitute the crime of abduction.

VA. CODE § 18.2-47; Punishment: 18.2-10(e).

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use or display in a threatening manner a firearm while abducting Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did rob Alexander V. Defilippis of his wallet, watch, clothing, and other personal belongings.

VA. CODE § 18.2-58.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm while robbing Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did willfully, deliberately, and with premeditation kill and murder Alexander V. Defilippis in the commission of robbery while armed with a deadly weapon.

VA. CODE § 18.2-31.4; Punishment: § 18.2-10(a).

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY did use a firearm to murder Alexander V. Defilippis.

VA. CODE § 18.2-53.1.

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

APRIL 1, 1996

THE GRAND JURY CHARGES THAT:

On or about December 5, 1995, in the County of Montgomery,

BENJAMIN L. LILLY, having previously been convicted of a felony under the laws of this Commonwealth, did knowingly and intentionally possess a firearm.

VA. CODE § 18.2-308.2A.(i); Punishment § 18.2-10(f)

A TRUE BILL **/s/ Robert K. Illegible**
FOREMAN

WITNESS:

Investigator R.L. HAMLIN

Interviewer: Lieutenant Gary Price

Interview with
William Whitsett
December 7, 1995
At the Giles County Sheriff's Office

Interviewer: Lieutenant Gary Price
Date: December 7, 1995
Time: 11:15 AM

G.P. I will be talking with Pearisburg Chief, William Whitsett. Chief, the other night on December the 5th, during the incidents of the two armed robberies in the Eastern section of the county, you contacted the office and asked if any additional assistance would be needed in that area. And I, as a member of the Sheriff's Office, requested that you do respond to that scene of which you did. When you arrived in that area, did you have an occasion to see or have a conversation with any of the three subjects that were apprehended?

B.W. Yes, I did.

G.P. Which subject did you meet or have a conversation with?

B.W. I had the occasion to have a conversation with a person that was later identified to me as Mr. Ben Lilly, who happened to be seated in the rear of officer Randy Tilley's police car.

G.P. If you would, tell us what that conversation consisted of.

B.W. Well, at the time of my arrival you had, of course, had Mr. Ben Lilly in custody, and another subject who I didn't know who was at that time, had just been apprehended. I went to assist Pearisburg unit,

Randy Tilley, he had in the back seat of his car Mr. Ben Lilly. I guess I was with Mr. Ben Lilly for about an hour or so, I don't know, I don't have exact times. But, during that hour that I was with Mr. Lilly, he made a special request to me. He asked me if I would do him a special favor. I asked him what that favor was and he said that he wanted me to put the barrel of the shot gun I had in my hand in his mouth and pull the trigger. I said "Well, you know that I can't do that. Do I look like a murderer?" And he said something and he was sitting in the police car at the time with the window cracked probably about five or six inches. And I said, "Well, what does a murderer look like anyway?" And he sort of hesitated a moment and I backed away from the car and I thought I heard him say "Me."

G.P. Referring to himself?

B.W. Himself. And then I went back to the cracked door, I said "What did you say?" He said that he was gonna go to hell and meet with his brother. I said "Well, why would, what are you talking about?" And he said that his brother had committed suicide some eight years earlier the 12th of December as a matter of fact, eight years ago. And I said "Well, why would your brother be in hell?" He says, "Well, he may not be there. He probably won't be there." And I said "Well, why would you be in hell?" And that's when he ceased making any further comments.

G.P. During the time prior to this or after this did you attempt to solicit information concerning any of the crimes that had just occurred from this subject?

B.W. The only information I was attempting to solicit from Mr. Lilly, Mr. Ben Lilly, at that time was a description of this fourth person. Who, we later

found out was not at existence, but that was the only information I was attempting to solicit from him.

G.P. And the statements that he made to you about placing a gun into his mouth, that is an unsolicited conversation that he initiated?

B.W. Oh yeah. I was just standing there and he asked me to do a special favor. I think it's also important to know that this is prior to any information that we had at that time about a murder that had been committed in Montgomery County. We had no information at that time.

G.P. Interview will end at 11:20 AM.

Transcribed by:

Christy Cumbee

INSTRUCTION NO. 31

The Court instructs the jury that, while they may find a verdict upon the uncorroborated testimony of an accomplice, such evidence is to be received with great caution.

The Court further instructs the jury that the testimony of an accomplice must be received with great care and caution, and if you believe the testimony of an alleged accomplice was false, and that he was induced to testify falsely either by fear or punishment or hope of reward, you must disregard that testimony in its entirety. Nevertheless, if you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, you may convict on the uncorroborated testimony of a single accomplice.

JURY INSTRUCTION 36

Members of jury, as to the testimony of Mark Lily, you must not draw any INFERENCE WHATSOEVER from the fact that Mark Lilly claimed his lawful right, as guaranteed by the Fifth Amendment, not to be compelled to incriminate himself.

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF **MONTGOMRY [sic] COUNTY**

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 121

Hearing Date: **FEBRUARY 11, 1997**

Judge: RAY W. GRUBBS

COMMONWEALTH OF VIRGINIA

V.

BENJAMIN LEE LILLY, DEFENDANT

This case came before the Court for sentencing of the defendant, who appeared in person with his attorneys, Christopher A. Tuck and Max Jenkins, **heretofore appointed by the Court to represent him.** The Commonwealth was represented by **E. Curtis Schwab, Jr.**

On **October 25, 1996** the defendant was found guilty by a jury of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
13636	CAPITAL MURDER	12-5-95	18.2-31.4
	USE OF FIREARM IN CAPITAL MURDER	12-5-95	18.2-53.1
	ABDUCTION	12-5-95	18.2-47
	USE OF FIREARM IN ABDUCTION	12-5-95	18.2-53.1
	CARJACKING	12-5-95	18.2-58.1

USE OF FIREARM IN CARJACKING	12-5-95	18.2-53.1
ROBBERY	12-5-95	18.2-58
USE OF FIREAM IN ROBBERY	12-5-95	18.2-53.1
POSSESS FIREARM BY A FELON	12-5-95	18.2-308.2.A.(i)

The post sentence report was considered and is ordered filed as a part of the record in these cases in accordance with the provisions of code § 19.2-299.

After hearing evidence on behalf of the defendant, the Court considered the report of the probation officer and the VICTIM IMPACT STATEMENT, and such report is filed herein as a part of the record in these cases in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced. The Court heard the defendant's statement.

The Court, in accordance with the jury verdicts, **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of:

1. CAPITAL MURDER-DEATH
2. USE OF A FIREARM IN CAPITAL MURDER – 3 YRS
3. ABDUCTION – 10 YRS

4. USE OF A FIREARM IN ABDUCTION – 3 YRS
5. CARJACKING-LIFE
6. USE OF A FIREARM IN CARJACKING – 3 YRS
7. ROBBERY-LIFE
8. USE OF A FIREARM IN ROBBERY – 3 YRS
9. POSSESSION OF FIREARM BY A FELON – 5 YRS

The total sentence imposed is **DEATH, LIFE (2) PLUS 27 YRS.**

After pronouncing sentence, the Court proceeded to advise the defendant of his right to appeal from the sentences heretofore imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs, and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

The costs of this proceeding totals $69,819.75.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

It is further ordered that as soon as possible after the entry of this order, the defendant be removed and safely conveyed according to law from the jail of this County to

the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

/s/ Illegible
DATE

ENTER: /s/ Ray W. Grubbs
RAY W. GRUBBS, JUDGE

DEFENDANT IDENTIFICATION:

Alias: N/A

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* * *

[242] in very small print, is that correct?

A. That's correct.

Q. Would you examine that transcript and see if that is as far as you know a true copy of that transcript and if that is what you're testimony was on that day?

A. I have reviewed it, and it, it to the best of my knowledge this is the transcript and my testimony.

Q. All right. And you did discuss, have a discussion especially on Page 74, you had a discussion with him about taking a paraffin test, is that correct?

A. I, we refer to it as a GSR Test.

Q. All right.

THE COURT: Which page, Mr. Jenkins?

MR. JENKINS: 74.

THE COURT: All right, sir.

Q. Would you take a look at that page and see if everything in that is correct and true?

A. (Reviewing). To the best of my knowledge, yes.

Q. Okay. And to the best of your knowledge [243] then and even now, you told them it would be voluntary whether or not that he took the paraffin test, is that correct?

A. Yes, sir.

Q. All right.

MR. JENKINS: Your Honor, I'd like to introduce this as our exhibit –

THE COURT: All right, sir.

MR. JENKINS: For this proceeding and I don't know how you want, would like for that to be made.

THE COURT: Any objection, Mr. Schwab?

MR. SCHWAB: No, Your Honor. I believe it's attached to the copy of the –

THE COURT: It is. All right, sir.

MR. SCHWAB: If the Court would simply accept it with the Court and Motion, Your Honor.

MR. JENKINS: That would be agreeable, Your Honor.

THE COURT: I will. It will be filed with the motion.

MR. TUCK: Your Honor, it was filed with [244] the motion as I recall.

THE COURT: Oh, okay. I know I have received a copy of it. All right.

MR. JENKINS: Your Honor, that's all.

THE COURT: All right, thank you. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Lieutenant Price, you had advised him of his -Miranda Warnings?

A. That's correct.

Q. And how did he waive those Miranda Warnings?

A. According to the transcripts, he did not make any sound. Evidently, he would indicate by shaking his head yes and he also signed a Miranda Waiver Form also indicating that he was willing.

Q. Was that in your presence?

A. Yes, it was.

Q. All right. And how long did the actual interview with Mr. Ben Lilly last?

[245] A. The interview started at 3:55 a.m. and concluded at 4:17, which would be twenty-two (22) minutes.

Q. And any point, and during that time was the, your recorder on the entire time?

A. Yes, it was.

Q. And any time in there, did he indicate he didn't wish to speak with you any further? He wanted to exercise his right to an attorney at that point?

A. He gave me no indication of that.

Q. And where did the interview take place?

A. In the investigation section. We have a interview room.

Q. And how was the defendant dressed at that point, if you recall?

A. According to my notes, he had handcuffs on, but as far as dress, I don't, don't recollect at this time.

Q. Was he handcuffed in the front or back, if you remember?

A. My policy is when I interview them, they [246] are handcuffed. It would be in the front.

Q. And when you completed your interview on tape, that's when you spoke to him about if he'd take the, is it GSR Test?

A. Yes. It's a Gun Shot Residue.

Q. And I believe on the tape you had asked him if he'd fired a gun that day, is that correct?

A. That's correct.

Q. And was anyone else present when you were speaking to him about the possibility of the test?

A. The evidence tech, Mark Skidmore, would have been present. He would have performed the GSR Test.

Q. Okay. And when you say it's voluntary, is there any permission form or anything that your department uses?

A. If he would have, grant us permission we would have had him sign a, a permission to, we consider it a search, and he would have to sign a permission search form.

Q. Now, do you recall for the purposes of this hearing, what his response was to your request that [247] he take a GSR?

A. I would just have to base it on the fact that he did not submit, that his answer was no.

Q. Did you ask him anything else after that? After he indicated for whatever reason he didn't want to take the test? Was there any other further interrogation of him?

A. To my knowledge, no, sir.

Q. Not by you anyway?

A. No, sir.

Q. And where did he go after he finished his interview with you? If you know.

A. I would think to the, before the magistrate.

Q. And who took custody of him at that point? After he left you?

A. To the best of my recollection, it would have been Mark Skidmore and perhaps a jailor.

Q. Mr. Skidmore being the evidence tech?

A. That's correct.

Q. And after you'd ask him if he was willing [248] to take a GSR, Gun Shot Residue Test, did you observe him make any motions with his body?

A. He was rubbing his hands together.

Q. Had he been doing that before?

A. I did not observe him doing that before.

Q. And there was no gun shot residue test performed on him?

A. Not by our department, no, sir.

Q. Was there, did you request that of the other two (2) gentlemen you spoke to that evening concerning these offenses?

A. I –

Q. Mark Lilly and Gary Barker?

A. I did.

Q. And were those, the interviews with them, were they taped?

A. Both interviews were taped. That's correct.

Q. Did you ask both of them while the tape recorder was running if they were willing to take a GSR Test?

[249] A. I reviewed my notes and one was asked while the tape was running and the other one was not.

Q. Did they both sign written waivers?

A. They did, yes, sir.

Q. All right. Thank you.

REDIRECT EXAMINATION

BY MR. JENKINS:

Q. Do I understand that they refused to take the paraffin test too?

A. No, they both submitted.

Q. And you all did take from them, is that correct? Are you sure of that?

A. Yes, sir. I have permission slips signed by Mr. –

Q. Lilly?

A. Mark Lilly and Mr. –

Q. Do you know what the results of those tests was? I'm not sure, I don't think we've ever –

MR. SCHWAB: Your Honor, I believe if Mr. Jenkins will read on Page 75 of the transcript they submitted to the Court. Investigator Price, Lieutenant [250] Price answered that question at the preliminary hearing, that they were never submitted.

THE COURT: All right. I'll give you a minute, Mr. Jenkins, to review that.

MR. JENKINS: Well, it's not in the record, Your Honor. If I could cross-examine him on what he testified to, I'd sure appreciate it.

THE COURT: Well, is that not on the record that we have copied here?

MR. JENKINS: Yes, sir, but so was a number of the other things which Mr. Schwab asked on that too, Your Honor.

THE COURT: All right, go ahead.

MR. JENKINS: I just wanted to, it's not fair for him to emphasis that and for us to leave that into the background.

THE COURT: Go ahead.

Q. And what, and you did not submit those test, is that correct?

A. That's correct. Both subjects had indicated they had fired a gun today, that day.

[251] Q. Did they indicate that Mr. Benjamin Lilly had fired a gun?

A. I would have to review –

Q. Okay.

A. Both of their transcripts to see.

Q. Now, let's talk about this paraffin test. You told Benjamin Lilly it was voluntary on his part to take this paraffin examination, is that correct?

A. I can tell you what my wording is normally is by based on what I told –

Q. Well, let me ask you –

A. Mr. Lilly. Mr. Mark Lilly. I can read what I told him on tape and that's generally the way I word things.

Q. Well, but what you testified to under oath in Court on Page 74 of the transcript, which I have just shown you, is that you told them it would be voluntary, is that correct?

A. Yes, it would, generally I'll say, with your permission or if you will give us permission to perform this test on you –

[252] THE COURT: Let Mr., were you on Page 74?

MR. JENKINS: Page 74, Your Honor.

THE COURT: Yeah, but do you have a copy of that transcript, Mr. Price?

MR. JENKINS: Yes, sir, I've already asked him, Your Honor, on direct examination –

THE COURT: All right. Let, let him review it just a minute before he responds to your questions. Page 74.

Q. That was what you told Mr. Lilly, would that be correct? Benjamin Lilly, I'm sorry.

A. That's correct.

Q. All right. Now, –

A. What I said, what I specifically said, this is voluntary or I would have worded it to the fact that if you will grant us permission or if you will allow us, but when his reply was no, then we didn't pursue it.

Q. So, you indicated to him that he had a choice?

A. Correct.

Q. Okay. Now, do I understand that a [253] paraffin examination is where they put paraffin on your hand and they remove it?

A. That method is one of the older methods. The method that's used now days –

Q. What was the method that you were contemplating using that day? Let me put that way.

A. It's, it's no longer using any kind of paraffin or wax. It's a chemical. It comes in a package. A sponge like

container that has chemicals apparently within this container and it is dabbed throughout the hand area, inside and through the fingers area.

Q. And is that taken off? That substance is dabbed in between your fingers. Is that taken off?

A. That, the applicators will pick this gun residue up, yes.

Q. But what, I'm sorry, Gary, what I'm asking you, you've told me that some substance was placed on your hand in the vicinity of the knuckles or the fingers –

A. Yes.

[254] Q. Would that be correct?

A. The gun shot residue collection kit comes with, it's also contained and has its own applicators or what is used to retrieve the –

Q. Okay.

A. From the individual.

Q. So, that's my point. You put some kind of application or a technician does on the hand and that retrieves the gun shot residue, would that be correct?

A. That's correct.

Q. All right. Well, and you were under the impression that you had to get a warrant to do this, is that what I understand your testimony was?

A. I consider it a search, yes, sir.

Q. You consider it a search. Now, did you make an application to the magistrate to search him, to search Benjamin Lilly?

A. No, sir, I did not.

Q. Well, why didn't you?

A. Well, at the time involved and the fact that he was rubbing his hands together would probably, [255] would have eliminated in all likelihood a chance to have retrieved any, any evidence or any residue from his hands.

Q. How did he rub his hands?

A. (Demonstrating with hands).

Q. Did you tell him to stop?

A. No, sir.

Q. Nobody ever indicated to him that he wasn't supposed to rub his hands or stop?

A. Not to my knowledge.

Q. And you told him it was voluntary and he said, I don't want to do it. Would that be correct?

A. That's correct.

Q. That's all.

THE COURT: Any further questions, Mr. Schwab?

MR. SCHWAB: If I could have one moment, Your Honor.

THE COURT: Yes, sir.

RECROSS-EXAMINATION

BY MR. SCHWAB:

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[86] THE COURT: All right sir, thank you. Mr. Schwab may have some questions to ask you, Mr. Schwab.

MR. SCHWAB: Thank you Your Honor. Mr. Harrison, my name is Skip Schwab, as you may remember from when the Judge introduced everybody, and this is Peggy Frank, she is also an assistant in our office, I'll be handling this case unless I get lucky and get some help from her. This is the part of the proceeding that is known as voir dire, where the juror members are questioned so we can select the most fair and impartial jury possible for both Mr. Lilly and the Commonwealth.

MR. HARRISON: Yes sir.

MR. SCHWAB: And that's the way the process works, you are going to be asked a lot of personal questions about your background, about your family, about your beliefs and philosophy, we want you to know that there is no right or wrong answer, what we want you to do is be completely open and and honest with it. You are not here to impress anyone, and we don't want you here to impress anyone, but we do apologize if some of the questions seem personal and they may tend to embarrass you. All that being said, Mr. Hampton how do you feel about being here today?

MR. HARRISON: All right.

MR. SCHWAB: Okay, do you have any bumper stickers on your vehicle?

[87] MR. HARRISON: No sir.

MR. SCHWAB: Okay. Now I think you told the Judge that you have heard information about this case?

MR. HARRISON: Through the newspaper.

MR. SCHWAB: Have you ever discussed it with any of your co-workers or friends or anything like that?

MR. HARRISON: Yes sir.

MR. SCHWAB: And did you express any strong opinions about the case when you spoke with your co-workers?

MR. HARRISON: As far as forming an opinion?

MR. SCHWAB: Yes.

MR. HARRISON: Yes sir.

MR. SCHWAB: And do you think there is any possibility of you being able to put that opinion aside and judge the case on what was heard in the courtroom?

MR. HARRISON: No sir.

MR. SCHWAB: All right, thank you sir, I appreciate it.

THE COURT: Thank you Mr. Schwab, are there any questions Mr. Tuck?

MR. TUCK: No questions Your Honor.

THE COURT: All right sir, thank you Mr. Harrison for your honesty and your candor, if you will go with the bailiff please.

[88] MR. HARRISON: Thank you sir.

THE COURT: Gentlemen, is there any challenge to Mr. Harrison.

MR. TUCK: Yes Your Honor, I believe Mr. Schwab would probably concede as well on the last point that he's said that he could not be impartial during the course of this trial based on the information he's received from the media, he's expressed a strong opinion about this case, and he does not believe he could be impartial and we would move for cause to be removed.

THE COURT: All right, thank you Mr. Tuck. Is there anything you wish to add Mr. Schwab?

MR. SCHWAB: No Your Honor.

THE COURT: Do you concur in the defense motion?

MR. SCHWAB: Yes Your Honor.

THE COURT: All right sir, I think having considered Mr. Hampton's responses, it is appropriate that he be dismissed for cause. If you would notify him please that he's free to go. Who is the next member.

MR. TUCK: Do you wish for me to bring Mr. Williams in at this point in time?

THE COURT: Not right this minute. You can tell him it will be a few minutes, and then we'll take that up separately.

[89] THE CLERK: Geraldine Horan, H-o-r-a-n.

THE COURT: Mrs. Horan, is that the correct pronunciation of your name.

MS. HORAN: Excuse me.

THE COURT: You tell me, what is the correct pronunciation of your name?

MS. HORAN: Horan.

THE COURT: Horan. Mrs. Horan, at this stage of the proceedings I am going to ask you several questions to follow through with the questions that I asked you earlier in the day, and also Mr. Schwab, who's the Commonwealth's Attorney will have certain questions to ask you, as well as either Mr. Jenkins or Mr. Tuck, who represent the defendant. I want to make sure that you understand each question that is asked. If you do not understand, you let me know.

MS. HORAN: Okay.

THE COURT: And I also want you to answer these questions as truthfully and as with much candor as you can because your responses are most important.

MS. HORAN: All right.

THE COURT: All right, thank you. The first question that I am going to address Mrs. Horan is whether or not you have ever been convicted of a felony?

MS. HORAN: No, I have not.

* * *

[286] MR. SCHWAB: And do you promise that if in the jury room you have a doubt as to some fact or issue in the case that you will ask yourself whether or not there is a reason for that doubt based on the evidence, your evaluation of the evidence, your common sense and experience?

MS. LOVEDAY: Yes.

MR. SCHWAB: Thank you very much Ms. Loveday.

THE COURT: Thank you Mr. Schwab. Mr. Tuck.

MR. TUCK: Thank you Your Honor. Ma'am, my name is Christopher Tuck, and I've got a little bit of a cold so if you have trouble understanding me please just stop me and let me know and yes I do have a southern accent so if you can't understand that let me know and we'll be happy to repeat the question. Mr. Jenkins and I represent Benjamin Lilly. Mr. Jenkins is the man with the beard back there, and we're going to be asking you several questions just as the Commonwealth did. Some of the questions are a little bit repetitive so please forgive me about that, but the questions are intended to see if you qualify as a juror to sit on this case. Now as you probably know, every citizen has a duty to sit on a jury, but also every citizen has a duty not to sit on that jury if they cannot be fair to themselves, the Commonwealth, or Benjamin Lilly, the defendant in this case. Now you shouldn't be embarrassed if for some reason you don't

serve on this case. It doesn't mean you are on a jury panel it doesn't mean

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Testimony of Patricia Quesenberry / Cross

[168] Q. All right. Thank you very much, Ms. Quesenberry.

THE COURT: Mr. Tuck.

MR. TUCK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. TUCK:

Q. Ms. Quesenberry, hold on a second while I move a little furniture around and I want you to take a deep breath. I know you are nervous. Is this the first time you've ever testified in Court?

A. Uh-huh.

Q. All right. I just want you to take a deep breath and remember what you done. You swore you'd tell the truth. Now, did you ever see during the course of this evening, the night before Alexander Defilippis was murdered, did you ever see Benjamin Lilly with any of the firearms?

A. No.

Q. Now, you indicated that Mark Lilly took a money clip. Could you describe that to the jury? What did the money clip look like?

[169] A. He grabbed it up so fast and stuck it in his pocket because he wanted it. I can just tell you that it was a shiny, gold color is all I could tell you.

Q. Shiny, gold color?

A. Uh-huh.

Q. You indicated that these men had been drinking some liquor, is that correct?

A. Uh-huh.

Q. You said, I believe you indicated about four (4) or five (5) different bottles?

A. Uh-huh.

Q. When you came in you, you, I believe you indicated that you were woke up because you heard the voices, is that correct?

A. Uh-huh.

Q. You came down the hallway and you got to the corner. Do you recall what Ben Lilly had in his hands when you got in there?

A. A bottle of liquor.

Q. All right. What kind of liquor did Ben Lilly have in his hands?

* * *

Testimony of Ron Lucas/Direct

[192] well, it's warm. And I said, Mark, is the gun hot? He said, yes, at which time I handed the gun back to him. I put the bullets back into the chamber and handed it back to him and about that time both Gary Barker and Benjamin Lilly came out and approached the car and at that time, I remember Gary reaching in the back seat and pulling out a 12 gauge shotgun and, ah, Ben Lilly was right behind him or close, close there with him, and Ben Lilly said, put the, the God damn guns away, and that's pretty much all I remember the guns being put into the trunk of the car. I got out of the car and went back into Cowboys and they weren't there very much longer.

Q. Did they come back into Cowboys?

A. I don't believe no.

Q. So, you saw a shotgun and a pistol?

A. Yes, sir.

Q. And you said you unloaded the gun and it was a revolver?

A. Yes, sir.

Q. And then reloaded it?

A. I reloaded it, yes.

* * *

Testimony of Danny Sanders/Direct

[203] Q. Had either Mark or Gary or both ever been to your residence?

A. Yes, Sir.

Q. Approximately how many times?

A. Ah, two (2) or three (3) times.

Q. And on December 3rd or 4th, were you at home?

A. No, sir.

Q. Where were you?

A. I was in Tennessee.

Q. And what were you doing?

A. Working.

Q. And when did you leave for Tennessee?

A. Ah, on a Monday morning.

Q. Was there anyone else you left at your house?

A. No, Sir.

Q. Was there anyone you left to check on your house?

A. Yes, my sister.

Q. Had you spoken to Gary or Mark about going [204] out of town?

A. Well, they knowed I worked out of town.

Q. But you don't know if they knew you were out of town this time?

A. Yeah, they knowed I was out.

Q. And you left Monday morning?

A. Yes, sir.

Q. Was there a time after Monday morning you had to return home?

A. Ah, well, I didn't come home until on Friday evenings.

Q. Okay. Did you come home earlier that week?

A. Yes, I came home on Tuesday evening.

Q. About what time?

A. Ah, about 7:00 or 8:00.

Q. At night?

A. Yes, Sir.

Q. Was that because you got a call from your sister?

A. Yes, Sir.

* * *

[225] inside the car.

Q. All right. And when you got there where Officer Tilley was, did you see a vehicle besides his?

A. Yes, I did.

Q. And where was that?

A. It was facing the direction in which we were travelling. In other words, it was coming toward us. It was on the side of the road. Had pulled off of the travelled portion of the highway and stopped.

Q. All right. And how far away was the person walking to Officer Tilley when you got there?

A. The –

Q. From the car.

A. From the car. He had parked his car maybe twenty yards, fifteen yards from, from the parked car and the subject was probably half way between the two vehicles some ten yards, ten or twelve yards.

Q. All right. Was this person walking normally or had they, were they in any particularly kind of stance or had their hands –

A. No, he was approaching with his hands up.

[226] Mr. Tilley had a weapon drawn on the subject.

Q. All right. And what happened as he got to Officer Tilley's car?

A. As he came to the car, that's about the time I arrived. We took the subject to the rear of the car, Randy Tilley's car, placed him on the ground and, ah, searched him for weapons and handcuffed him and then placed him in officer Tilley's vehicle.

Q. All right. And who was that person that was walking towards Officer Tilley's car?

A. He was identified an Benjamin Lilly.

Q. And do you see him in the Courtroom?

A. I do.

Q. And would you point him out, please?

A. Sitting between Max Jenkins and Christopher Tuck to my right.

Q. All right. Now, did you assist in the search for weapons –

A. Of Mr. Lilly?

Q. Of Mr., yes.

A. I think I, I covered Officer Tilley while [227] he patted him down and handcuffed him.

Q. All right. Do you know if a knife was removed from him?

A. It was. It was taken from Mr. Ben Lilly's, one of his pants pockets.

Q. Was that turned over to your evidence technician, Mark Skidmore?

A. It was, yes.

Q. All right. Did Mr. Lilly say anything as he approached you all or as you got him to the back of the vehicle?

A. He was asked, I think he was asked how many other people were involved and, ah, or was with him and if they were armed. Officer Tilley also said that he observed two (2) people fleeing the vehicle in addition to Mr. Lilly.

Q. All right. And did Mr. Lilly tell you if there was anybody else with you, with him?

A. He told us that there were three (3) other people and that they had assault rifles.

Q. Did he give you names at that time?

[228] A. He furnished some names to us, yes.

Q. All right. Do you recall what they were now?

A. The only name I can recall that he furnished was a Rader subject. Either a Mark or a Mike Rader.

Q. All right. And did Mr. Lilly say anything else to you at that time?

A. He indicated that he had been hitchhiking and these, these subjects had picked him up and also that he was working as an undercover officer for the Montgomery County Sheriff's Office.

Q. After he told you he was working undercover for the Sheriff's Office, did he ask you to do anything for him?

A. He indicated that if we would take the cuffs off that he would get us the name and number to call to check on it.

Q. And what did you and the other police officers then do after you had Mr. Lilly in the, Officer Tilley's car?

* * *

[231] Q. Were you able to verify whether or not he was working undercover with anyone with the Montgomery County Sheriff's Office?

A. I did not receive an indication from Montgomery County officers that that was the case.

Q. And did you conduct an interview with Mr. Lilly?

A. Yes, sir, I did.

Q. And where was that conducted?

A. The Sheriff's Office, the investigator's section has an interview room.

Q. All right. And he came to the interview room?

A. Yes, he did.

Q. And at that time, was he given his Miranda Warnings?

A. He was, yes.

Q. And did he agree to waive those and speak with you?

A. Yes, sir, he did.

Q. And you interviewed him at that time, is [232] that correct?

A. Yes, sir, that's correct.

Q. Did you make a recording of that interview?

A. I did.

Q. Have you since had that recording transcribed?

A. Yes, sir, we have.

Q. Have you listened to the, the tape?

A. Yes, sir.

Q. Since that, and have you compared that with the transcription you made?

A. Yes, sir, I have.

Q. And would you tell the Court whether or not it's accurate?

A. It is an accurate transcript.

Q. All right. Do you have that with you, sir?

A. I do.

Q. And do you, I believe we have a device over here to record that or play it back?

* * *

Testimony of Gary Ray Price/Direct

Interview With
Benjamin Lee Lilly

Interviewer: Lieutenant Gary Price
Date: December 6, 1995
Time: 3:55 AM

G.P. State your full name.

B.L. Benjamin Lee Lilly.

G.P. L*I*L*L*Y?

B.L. Yeah.

G.P. No "E" in it?

B.L. No.

G.P. What's your mailing address?

B.L. Post Office Box 217, Rimer, Virginia 24149

G.P. And your date of birth?

B.L. 2/29/ of '68

G.P. And your social security.

B.L. 230-96-7040.

G.P. Okay. Mr. Lilly, I'm an investigator for the Sheriff's Department here and I'm gonna ask you some questions about some things that transpired over the last forty-eight hours. Because the answers you give me may incriminate you in some criminal activity, I'm gonna advise you of the Miranda Warnings and the rights that you have, and I want you to listen to them very carefully. If you have any questions on any of them, I will try to explain them to you so that you fully understand them. **You have**

the right to remain silent. That means you don't have to talk to me. I can't make you talk to me. **Anything that you do tell me, I can and I will use against you in the court of law on any charges that are brought. You have the right to have your attorney with you while you're being questioned and if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements.** In other words, if you have an attorney retained or whatever, family attorney, you have the right to have them here. If you can't afford one, then the court will appoint one to be with you. If you decide to waive these rights and talk to me and then somewhere along the way you wanna quit, you can quit at any time. Do you understand that?

B.L. ****No Statement Made****

G.P. Okay, did you understand those rights?

B.L. ****No Statement Made****

G.P. Alright listen to this part, this is equally important, **having been advised and fully understanding my rights, do freely and voluntarily, without threats, promises, pressure or coercing agree to talk with Gary Price a law enforcement officer.** If you answer my questions, you're doing it on your own free will. I can't make you, I can't force you, and I'm not gonna trick you. **Are you willing to answer some questions concerning your activities and those activities of Mark Lilly, your brother, and Gary Barker, a friend of yours, over the last forty-eight, twenty-four hours?**

B.L. We'd been ah . . .

G.P. First of all, you willing to answer some questions concerning those?

B.L. ****No Statement Made****

G.P. Get you to sign and date that. That states I read the rights and you're talking to me on your own free will.

B.L. You don't have any cigarettes with you do you?

G.P. No, I don't smoke and you got the same problem up her you had down stairs with those computers. I'll get you outta here and let you have another one here in a few minutes.

B.L. Today's date?

G.P. 12/6/95

B.L. We'd been ah, drinking quite a bit of liquor over the last few days.

G.P. And when you say "we", who you talking about?

B.L. The three of us was, been drinking quite a bit of liquor of the last few days.

G.P. Talking about Gary Barker and Mark,

B.L. Yeah.

G.P. Your brother?

B.L. Yeah.

G.P. Okay, go ahead.

B.L. Okay, we'd been, you know, drinking liquor over the last few days, you know. And then I get to where I drink so much I pass out, you know, black out and all that. So, you know, a lot of stuff, you know, is like, you know, I'd be at one place, we'd be drinking. So, you know, I'd pass out, and then

when I come to, be somewhere else, or we on the road or something, you know. And then tonight I'd went up with them, they picked me up up there coming down Prices Fork Road, in the little car, they pick me up, and then, going toward West Virginia. We's gonna go over in there, got some kin people live over there. I said, "Well hell, stop here and I'd get some beer."

G.P. And when you say "stop here" where was you talking about?

B.L. There's a store, leave right off 460.

G.P. Here in our county, Giles County?

B.L. I think so.

G.P. Okay, go ahead.

B.L. Okay, and then, and I said "Hell, stop here," you know "I'll get some beer." So then they said "Alright." you know, and I went in there, and I went back to the cooler, you know, where the beer was at, cause it was in the back. I went back to the cooler and the next thing I know, you know, here we come up in there and they got guns and shit, you know. And this old guy and old woman in there. The old woman had done run to the back of the store, and I told her, I said "Look, stay down" I said "god dam, stay down." I's going like this right here to them, I didn't know what the hell was going on myself, you know, I suppose to get some beer. And they come up in there running like that an shit, you know. I had a knife and I told them, I said "Look," you know, and I slung my knife and it stuck in the floor. And then I grabbed the knife and then I'd went up and then ah, Gary told me said, "Get that beer." I went like this right here, and the old guy, I seen it, he was sitting there at the dam, in between the counter and the wall and he hit it just

like this right here, I didn't see no blood or nothing, right. I didn't here [sic] no shots fired or nothing so I know they didn't shot him, but I didn't know if they hit him or not, right. So then I seen him like this right here, and he was going like this right here, you know, just shaking all to hell an shit, right. And then Gary told said, "Get that beer." I went like this right here and then it's, he's heading out the door, and then I seen the man in the door like this right here, you know, he was pointing the gun at me then. So then, you know, I picked up about six beers and I had, I think it was a five dollar bill in my hand, and then I laid it down right there.

G.P. You said Gary had the gun, what kind of gun did he have?

B.L. I'm not for sure what it was, I just know it was a pistol.

G.P. It was a pistol rather than a rifle shot gun he had?

B.L. Yeah.

G.P. What kind of finish did it have? Blue? Chrome? Stainless Steel?

B.L. Just blue finishing, you know, just a regular pistol, you know, it wasn't nothing . . .

G.P. Who's gun is that?

B.L. I don't know.

G.P. Had you seen it earlier that night, or?

B.L. Huh, uh, I hadn't seen that gun earlier that night, I seen the, I seen the rifle that he had had. And then ah, I'd seen it.

G.P. Okay.

B.L. And then ah, after that was over, I tried to get them to let me out, right. And then they came down to a place down here, the best I remember, it's next to a Dairy Queen, somewhere on the street where a Dairy Queen is.

G.P. That'd be in the town of Pembroke.

B.L. Yeah.

G.P. Are you familiar with Pembroke?

B.L. Not too much.

G.P. But you know that's where you were on the . . .

B.L. Yeah.

G.P. Okay, go ahead.

B.L. Cause I go by there a lot, you know, going, you know, my kin people, a lot of my kin people live over in Summer's County, and I travel 460. We's there at a store and I's trying to get out before we got to the store, I said "Man, let me the fuck outta here, let me the fuck outta here." I said "I ain't in all this crazy shit." I said, "Let me the fuck outta here." Alright, then they, they whipped up in there, and they said "Look, you take off, we gonna shoot you." you know. And you know, someone who's drunk an shit, hard to tell what the hell they've been on an shit, you know. I didn't wanna take no chances, I sat there, you know. And then they had me up front, and I's setting there, next thing I know here comes a gun man. Said "You drive." And Mark said "What a minute, hold up." He says "Drive it." you know.

G.P. Now who said that to you?

B.L. Ah, it was both of them. "You drive it." you know.

G.P. Who had the gun in their hand?

B.L. I think ah, I think Mark had the gun in his hand that time.

G.P. Okay, and what happened after that.

B.L. I drove, shit. And then we was going down next to a dam river, they said get down to the river. I said "Hold on." you know, I didn't know the way to the place they call the "Sand bar." But anyway, it was next to, you go by a railroad and all that shit. So then ah, we went down there and then ah, wasn't long after that we's pulled over and all.

G.P. Pulled over by the police or?

B.L. Yeah.

G.P. Then what happened at that point?

B.L. They had took off running and then when I got out, I was eating a granola bar, you know, they've done scared the hell outta me, you know, I was, I'm trying to get straight, you know, so then I's trying to eat something. And then they ran, and then a cop, you know, he made me stick my hands up and shit like that right there, and I soon as I got up there, man, they started sticking guns in my head an shit, you know. I hadn't had a gun in my hand, no pistol or nothing, except for that sixteen gauge, and they got to playing with that an shit. And I unloaded it, and there was one shell left in it, and I put it in my pocket to keep them from getting it earlier on that evening. You know, cause I don't, I don't like fucking nobody playing around me drunk with guns, you know. That shit don't go, alcohol and guns and fucking women and all that shit, that shit don't go, you know. And that's the only thing I done wrong since I've been out, is handle that one sixteen gauge pump shotgun.

G.P. So then, when the police stopped you, you they put you, or stopped you and detained you, or whatever they done.

B.L. Yeah.

G.P. And the other two ran?

B.L. Yes.

G.P. Do you remember what you told the officers there who those people were that ran?

B.L. Just Gary Barker, Mark Lilly, and Mike Raider. Cause he was in there earlier that evening.

G.P. So you told police it was four people counting you?

B.L. Yeah.

G.P. And three of them ran, even though there was two of you?

B.L. Two?

G.P. Two other than you. And you're saying and you're still saying there was four people that ran?

B.L. It was four of us, I can't rem., it might'a just been that two that ran. Because I can't remember exactly where he got out at. I don't know if it was right after that second place down next to the sand bar or what. But I remember he, he jumped out.

G.P. Was the fourth one with you when ya'll was over at the first store where the old man and woman were?

B.L. ****No Statement Made****

G.P. So there was four there?

B.L. Yeah.

G.P. Did he go, who all went into the store?

B.L. I went into the store to buy the beer, and I went back to the beer cooler, right. I was headed back that way, I didn't make it all the way back there, and I had money on me and all, and then the next thing I know, you know, he, they coming up in there with guns and shit. They done scared the hell outta both the old people and all that shit. I'm trying to tell the woman, you know, she's sitting there, and she's done turned white as a sheet, sitting there like this right here, said "Don't get up, don't get up." You know, I didn't want them to shoot either one of them. You know, "Don't get up, stay there, stay there." and all that shit. And then I told the, I hollered, told them "Ya'll get the fuck outta here." And then . . .

G.P. Now what was this about, you said you had a knife, what was the story on the knife?

B.L. Alright, I had a knife on me, I said "Stay here, stay here." I said "Don't get up and shit." And I had a knife on me and I pulled the knife out and I said "Ya'll get the fuck outta here." and I had the knife in my hands and then I threw it and it stuck in the floor on the first isle up. I said "Ya'll get the fuck outta here." and then I pull, picked the knife up, pulled it out, closed it up and put it back in my pocket. And I was going up there, then that's when Gary told said "Get that rest that beer." I said "No man." And I was looking over there and I seen the old guy he was just shaking, I didn't see no blood or nothing so I don't figure they hit him, he's just sitting down in between the counter and the wall. And then the next . . .

G.P. And what all did they take outta there other than the beer?

B.L. I think they got a little bit of beer and ah, I think they got some chewing tobacco and shit like that.

G.P. Did they get any money that you know of?

B.L. Not as I know of, I didn't see no, see I bought a case of beer right up there on at McCoy in ah, from ah, it's right before you get to, you know where the New River Junction Store is?

G.P. Uh huh.

B.L. Alright it's right before you get there, you know, before you go down hill and make a right. Alright, it was off of ah, I can't think of the name of the store but there's usually an old woman that runs it. I went in there and there was a heavy set girl tonight.

G.P. And you bought a case of beer there?

B.L. I bought a case of beer and two packs of cigarettes.

G.P. Was it pretty crowded in there when you were there?

B.L. Oh, no.

G.P. Any other customers?

B.L. Ah, no I didn't really pay attention.

G.P. The knife that you pulled out at Eggleston, is this the knife?

B.L. That's it.

G.P. Okay. And you pulled it out and told your partners to get outta there . . .

B.L. Yeah.

G.P. And then you threw it and stuck it in the floor, what was the purpose of throwing it and sticking it in the floor?

B.L. I tried to throw it at them.

G.P. Throw it at your partners?

B.L. Yeah, cause I didn't, you know, I don't play that shit man. Get up in there and fucking with old people like that, make them have a heart attack or somethin like. They fucking die, and shit you're getting a fucking murder charge and all kinds of shit. You ain't even suppose to be doing no shit like that to begin with, you know what I'm talking about?

G.P. So what was the original purpose of stopping at that store?

B.L. To get beer.

G.P. Even though ya'll had just stopped and bought a case of beer earlier?

B.L. Yeah, because we was getting ready to go across the state line and all to go in West Virginia. I said "Well hell, let me get some more beer, and then we'll have enough to do us till tomorrow."

G.P. So ya'll didn't discuss prior to that, let's go in there and rob this store?

B.L. Hell no.

G.P. And up to that point you didn't know that he had a pistol?

B.L. Huh uh. And then I'd say "Hell no." you know. That, if they would've been talking shit like that, I'd been, shit. I'd tried my damdest [sic] to got away from them.

G.P. What time did you get with Gary and Mark that day, yesterday?

B.L. Ah, maybe around seven or eight, something like that, nine or something.

G.P. In the morning?

B.L. No, in the evening is when I got back with them.

G.P. Was you with them earlier in the day?

B.L. Yeah, yesterday morning I was with them.

G.P. What were ya'll doing then?

B.L. Just drinking a little bit, drinking a little bit of liquor and all.

G.P. Were you riding around or were you at somebody's house?

B.L. We were ah, at ah, a couple of trailer courts, I can't remember their names or nothing.

G.P. How were ya'll getting from place to place that day, yesterday?

B.L. Okay yesterday ah, some guy in a tan van from Blacksburg gave us a ride, him and his girlfriend. I rode around with them looking for some kind of a pregnancy crisis place or something.

G.P. So the guy in a tan van and his girlfriend, you and Mark and Gary, ya'll just riding around.

B.L. We was looking for that place cause she had an appointment there and we was all in Blacksburg trying to find it.

G.P. And then what did they do, they drop you off somewhere, and you got back with them later that evening?

B.L. Yeah.

G.P. What time they drop you off that day?

B.L. Maybe around about one-thirty, two o'clock something like that.

G.P. And then what time did you get back with them?

B.L. It was around about, maybe seven or eight.

G.P. Where'd they pick you up?

B.L. It's was on ah, prices Fork Road.

G.P. At a residence?

B.L. No, I was hitchhiking.

G.P. They just come by and see you?

B.L. Yeah.

G.P. What were they driving them?

B.L. Some kind of little maroon car.

G.P. And then from there, that's when ya'll, who's car was it?

B.L. I'm not for sure.

G.P. You didn't ask them or anything?

B.L. No.

G.P. You ever seen it before?

B.L. Huh uh. But hell, them two boys they don't shit, they fucking buy a car every other day or something. Shit they give a hundred dollars for a car and then run the hell out of it, you know. I just figured they just wanted to ride, you know.

G.P. Did you end up with any of the money out of the first robbery over where the old couple were?

B.L. No.

G.P. They didn't give you money whatsoever?

B.L. No. Number one I wasn't trying to be involved, you know. I just got out on parole. Course now . . .

G.P. You and Gary get along pretty good, or you and your brother get along pretty good?

B.L. Me and Gary get along alright. Me and my brother, you know it's, we're about ten years difference in the age and, you know, sometimes we get along, sometimes we don't, you know. But ah, if I wasn't (not understandable) all this shit I believe I'd been better off, I would've waited there with them two old people till the police got there, you know what I'm saying. Them fella's riding around with them earlier, God Dam, you know.

G.P. When you came into Giles, they picked you up hitchhiking and ya'll rode into Giles, who was driving the red car?

B.L. I'm thinking Mark was.

G.P. And who would've been up front passenger side?

B.L. Gary.

G.P. And you got into the back?

B.L. Yeah.

G.P. And when you left the first store over there, who was driving them?

B.L. Ah, Gary.

G.P. And you were in the back?

B.L. Yeah.

G.P. And then Mark was a passenger?

B.L. Yeah. See what happened, I jumped in the back, because then they kept hollering "Come on, an come on." And I was up there and I wanted to stay and make sure that they wasn't, you know, hurt or nothing. I was up there at the counter, Gary told

me, said "Get the beer." I went like this right here, nodding my head, no. Next thing I know, you know, they still standing there dam guns waving and shit, you know. I didn't know if they was gonna shoot me or not, I grabbed six beers and I had some money in my hand the I dropped it on the counter.

G.P. When ya'll left that area and you went to the second store, what was the purpose of stopping at the second store?

B.L. I'm not for sure, I was trying to get away from them.

G.P. Were they, had they discussed going in there and robbing it?

B.L. They didn't say a word, and then they'd stop, and then I was trying to figure out how the hell to get away from them. And there was two or three vehicles out there, there was trucks and shit I didn't think they was gonna do no crazy shit like that. All them vehicles and all, and I was trying to figure out how the hell to get away from them.

G.P. So them two went in a store, left you in the car . . .

B.L. Yeah. And then when they came back out then these, I got a fucking gun in my ears, you know.

G.P. And they told you to drive on?

B.L. Yeah.

G.P. As you was driving down back down toward the river road, you remember a shot being fired, or a car chasing you?

B.L. I remember somebody said, the car was chasing, getting away from them, and I wasn't, I was trying, you know.

G.P. You don't remember hearing a shot, though?

B.L. I was too dam scared.

G.P. Okay.

B.L. To be honest with you, I was too dam scared.

G.P. And just on down the road a little short piece where a car, where the police officers came up on you, you tell me that you stopped or did the car break down on you?

B.L. It had broke down.

G.P. Just plain quit running?

B.L. Yeah. Over heated or somethin.

G.P. What were ya'll doing at that time? Were you getting outta the car, were you just gonna stay with it, or?

B.L. I was sitting there, didn't know what the hell to do, and then about the time it broke down then the cop pulled up.

G.P. You got outta the car?

B.L. Yeah, I was getting out.

G.P. You were driving it that time?

B.L. Yeah.

G.P. Did you bring a shotgun out with you and then place it back in the car when you saw the officer?

B.L. No.

G.P. So if the officer said that when you got outta the car,

B.L. No ah, Gary grabbed the rifle, and I was saying "Wait a minute," I said "Man, that's a policeman

and I setting here in a, unlicensed". Then the police hollering "Get the hell outta the mother fucker, get the hell outta that car mother fucker." And then I was eating a dam granola bar, and then when I got out then they fucking put guns to head and shit. And I told them, I said "Look man, I'm just eating something." I put my hands up like this right here, and then he said "Come here." I started going up there to where the lights was on the vehicle, and I started to get down, you know, to where the lights was, they said "No, I said come here." And then when I got there, then they slammed me to the ground, and I had all kinds of guns around my head.

G.P. The, was there a shotgun in the front seat where you were when you stopped and the police apprehended you?

B.L. I can't remember for sure, I can't remember, sir.

G.P. Anything else you wanna tell me?

B.L. No, I can't think of nothing.

G.P. Okay, interview will, let me ask you, have you at any time today fired a weapon or fired any, either the rifle, the pistol, or the shotgun?

B.L. No.

G.P. You didn't fire at anything today?

B.L. Huh uh.

G.P. Okay, interview will end at 4:17.

Transcribed by:

Christy Cumbee

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[239] Testimony of Gary Ray Price/Direct

A. He signed a written form, yes, sir.

Q. So, he was filling parts of it out as you were asking him those questions?

A. The only writing he would have done would have been the, where he put his signature at the bottom.

Q. All right. Now, you asked him if he fired a gun right at the end?

A. Yes, sir, I did.

Q. And after the tape was off, did you ask him to do anything or to check something about firing a gun?

A. I asked him if he would submit to a GSR Kit performed by the evidence tech to recover any powder residue that would have been on his hands.

Q. Okay.

A. The firing of any weapons normally leaves some powder residue on your hands.

Q. All right. Now, what do you mean by GSR What does that stand for?

A. Gun shot residue.

Q. So, you would of had the evidence tech [240] come in?

A. Yes, sir. He would have conducted the test necessary to recover the residue.

Q. And when you asked Benjamin Lilly that, what did he do?

A. Mr. Lilly was handcuffed during the interview for the safety of, of the officer. Mr. Lilly begin rubbing his hands in this manner right here (describing with hands).

Q. Had he been doing that before?

A. I had not noticed him, no, sir.

Q. Now, Mr. Lilly you talked to I believe beginning about 3:55 in the morning or thereabouts? Whatever you indicated on the tape?

A. At 3:55 a.m.

Q. Let me go back to the scene now where the vehicle was found and you came in contact with Mr. Lilly. How much longer did you stay at the scene?

A. After Mr. Lilly was placed in the police car, probably ten to twenty minutes, within ten to twenty minutes, a second subject was located and brought to a

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[249] him it was a voluntary test? That he didn't have to take it?

A. My words would have been, would you submit, which would been voluntary.

MR. TUCK: Your Honor, if I might have a moment or draw your attention to the preliminary hearing that occurred on, back in February.

THE COURT: Let Mr. Price see a copy of that transcript that you're referring to.

Q. Page 74 for the prosecutor it would be along lines 13, 12, 13. Does that refresh your recollection?

A. Would you like for me to read it or just read refer –

Q. Just simply read it to yourself and see if that refreshes your recollection.

A. Okay.

Q. All right. Now, did you indicate to Mr. Lilly that the test would be voluntary?

A. According to my testimony at the preliminary, I indicated to him it would have been [250] voluntary.

Q. Okay. And was your memory better back in February than it was in December, I mean, than it is today? Was your memory better in February than it is today?

A. It would be, but I'm –

Q. Okay.

A. Of the same answer, I'm sorry.

Q. No, you could have taken Mr. Lilly to the magistrate and gotten a search warrant to check his hands, is that correct?

A. That was an option I would have had, yes.

Q. And you didn't exercise that option, is that correct?

A. That's correct.

Q. You also took gun residue tests from both Mark Lilly and Gary Barker, is that correct?

A. They were asked during their interviews if they would also submit to a GSR Test.

Q. And they agreed. And they, the tests were taken. Were they ever sent off for results?

* * *

[265] that point?

A. Yes, sir, I was still moving then I pulled my patrol car cross ways in the road –

Q. All right.

A. And stopped.

Q. Did you see any persons around the vehicle?

A. Yes, air, two (2). The one (1) in the back and the driver, they jumped out of the vehicle and ran towards the rear of the vehicle.

Q. All right.

A. And the one (1) on the passenger's side exited the passenger's side of the vehicle.

Q. Okay. And then what happened?

A. He had, ah, it was a shotgun that appeared –

Q. Okay. Now, by he, who do you mean by he?

A. Ah, Mr. Lilly, Mr. Ben Lilly.

Q. All right. The gentlemn [sic] over there in the middle?

A. Yes, sir.

[266] Q. And where did he come from?

A. He came out of the passenger's side front seat of the vehicle.

Q. All right. And then what happened?

A. He had the shotgun in his hands and he turned towards me and that's when I ordered him to put the shotgun down.

Q. And how did, how was he holding it?

A. He was holding it. He didn't have it up to shoulder. He Just had it in his hands like that describing).

Q. Sort of across?

A. Yes, sir.

Q. And you ordered him to place it down?

A. Yes, sir, I did.

Q. Did you –

A. Probably two (2) or three (3) times, I told him to put the shotgun down and he laid it back onto the front seat of the vehicle.

Q. All right. Was there, the door open at that point?

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[359] Testimony of Robert E. Fleet/Direct

Q. And on –

A. He may have, but I, I can't remember that.

Q. That's all right. And on that occasion what did you do?

A. We conducted a search of the area around the body scene and the crime scene.

Q. All right. Did you locate anything –

A. We did. We, I located Item Twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26).

Q. All right. I believe those are eye glasses. Two (2) parts of the frames and two (2) lenses?

A. That's correct and a money clip.

Q. I show you Commonwealth's Exhibits Seven (7) (a) through (d) where they had been marked by you, is that correct?

A. That's correct.

Q. With the distances they were found from the relative position of the body?

A. That's correct.

Q. I believe when you went there on the 15th

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[365] Q. And that photograph?

A. This photograph shows partial frame. It's also south of the body in the edges, in the mud puddle that is frozen or partially frozen. Again, that was on the 15th. That's south of the body.

Q. All right. is that part of one (1) of the frames also or is it –

A. I believe it is.

Q. And in terms of, approximately where would it have been on that photograph?

A. You had to ask me that, didn't you? Ah, it's in this area here. I cannot seem to pinpoint it exactly in this photograph, but it was in this area right in here.

Q. All right. And from the other view?

A. This is the mud puddle. The lenses and the glasses would have been up in this area here.

Q. And I believe you also located something else that day?

A. I did. I located a money clip that was south of the body, ah, east of the mud puddle in the [366] grass area. Actually, what happened was, I kicked it up out of the snow. I didn't know what it was and picked it up.

Q. Was it just a clip itself or was it attached to anything?

A. There was a, a clip and it had an Indian head penny in it.

Q. All right. Did it have this black –

A. Yes, it had a black felt thing on it.

Q. All right. And examine that and be sure that's the one you found?

A. That is the one I found, 1890, ah, penny in it, a horseshoe clip.

Q. All right. And I believe for the record that's been identified by Mr. Sanders from Floyd as belonging to him –

A. He did.

Q. And having been taken from his house? Could you show us approximately where on that, if you can –

A. It's not actually in this photograph.

• • •

[481] A. Yes, that is correct.

Q. And I believe it was Deputy Buckland who provided you with items removed from Benjamin Lilly?

A. Yes.

Q. And would you tell the Court what those items were, please?

A. A brown Ziplock baggie containing smoking tobacco. An unopened pack of basic brand cigarettes. Assorted personal papers. A comb. Assorted keys. A nylon camouflage truffle wallet, which contained Ninety Five ($95.00) Dollars in currency and assorted other papers that are normally found in a wallet. A beaded type leather necklace. A key ring with a 1906 Indian head penny insert. A 1945 dime in a coin protector. A 1992 silver dollar. A 1982 George Washington Commemorative half dollar, also in a protective case. Two (2) disposable lighters. A nail clipper and eighteen (.18¢) cents in change.

Q. All right. And are those items still in your possession as your Item Number Ten (10)?

A. Ah, several of the items are. I, ah,

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[487] A. Yes, I did.

Q. And where was that done?

A. At the Giles County Sheriff's Department.

Q. And were the dabs made?

A. Yes, they were.

Q. And were they sent?

A. No, they were not.

Q. Did the, Investigator Price ask you to come to a room where he and Ben Lilly were?

A. Yes, he did.

Q. And were you present when the investigator asked if Mr. Lilly would allow the GSR to be done?

A. Yes, I was standing just outside the door to the, ah, the open door to the interview room.

Q. And was Mr. Lilly at that time restrained in any way?

A. Yes, he had on handcuffs.

Q. Front handcuffs?

A. In front, yes.

Q. And what did he do physically, if anything, after investigator Price asked if he'd take the [488] test?

A. Okay. He, ah, declined the test and started rubbing his hands together and (describing).

Q. Would you raise them up? Is that how he was doing them?

A. (Describing) Ah, a manner similar to this, Yes.

Q. And did you have anything to do with transferring Mr. Lilly from that interview room?

A. Yes. Lieutenant Price asked me to escort, ah, Mr. Lilly to the magistrate's office, which is downstairs from our offices, which I did.

Q. And did you notice if Mr. Lilly was doing anything with his hands then?

A. Yes, he was still rubbing his hands together and also I saw him rub his pants legs with his hand.

Q. In what area?

A. On his –

Q. Not his pants legs, but of his hands?

A. The palms, fingers, the, ah, you know, the [489] whole area.

Q. Are you aware of anything that would interfere or invalidate a GSR Test?

A. Gun shot residue particles are very fragile. They're, they're easily washed away. They can be washed away. They can be rubbed off very easily. Ah, you know, they're just, you know, they're very unstable I guess an far as being able to remain on a surface, ah.

Q. All right. Thank you. Deputy Skidmore, if you could just leave Item Ton (10) up there for possible later use, I'd appreciate it and then answer any questions Mr. Jenkins may have.

THE COURT: Mr. Jenkins.

CROSS-EXAMINATION

BY MR. JENKINS:

Q. Officer Skidmore, I have some questions that I would first of all like to ask you about the gun residue test, okay?

A. Okay.

Q. Now, when Deputy Price talked to Mr. Lilly, didn't he indicate to him that that was a

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[534] There was a graze wound next to the entrance wound where the bullet grazed the lip, entered the lip, passed across the lip and exited the other side. Ah, a little bit of bruising on the inside of the lip, no teeth were fractured or missing. No bullet was recovered. Wound Number Two (2) was located at the angle of the left jaw, just below the lobe of the left ear, in this region (pointing). This wound was oblique and it was oriented backward. There was no, no gun shot residue incidently around any of these wounds on the skin. The bullet passed backward through the soft tissue by the jaw and exited the back tissue of the soft tissue of the back of the neck. This bullet struck no vital structures and was not a lethal wound. No bullet was recovered. Wound Number Three (3) was located in the right temporal area just above the right ear and at this point (pointing). This wound was surrounded by a small amount of bruising. Ah, the wound path was from right to left and horizontal. The bullet passed through the brain, both halves of the brain, and was recovered beneath the left temporal bone in this region (pointing). This bullet was a lead alloy

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[536] and two feet away?

A. No. Greater than that distance.

Q. Oh, –

A. How much greater, I can't say.

Q. So, it would be somewhere beyond two feet?

A. Yes, sir.

Q. Now, you indicated, ah, that there was bruising around the one in the right forehead –

A. In the right temporal.

Q. The right temporal. And what does that indicate?

A. Nothing. It's a nonspecific finding.

Q. Did it indicate, did the examination of the body indicate that there had been bleeding –

A. There had been bleeding, yes, from all of the wounds.

Q. Now, can you tell the Court the wound to the lip. There was a slight graze and then it passed through. What kind of effect would that have on a person if they were hit by that kind of shot?

A. It would be painful, but not disabling.

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[569] Testimony of Patricia Taylor/Direct

A. The clothing from Benjamin Lilly consisted of two (2) socks, a belt, underpants, T-shirt, shirt and overshirt and jeans.

Q. Did your examination indicate whether or not there was anything that appeared to be blood on it?

A. Yes, it does.

Q. And where was that?

A. Test indicated the presence of blood on the bottom right leg of the blue jeans.

Q. Okay. Front, back, side, inside, do you remember?

A. on the outside back at the bottom of the right leg.

Q. Now, you first noticed this spot with your visual examination? Correct?

A. That is correct.

Q. And then you do the presumptive test?

A. That is correct.

Q. And what is that exactly?

A. This is a chemical test that will give me a positive reaction with blood.

* * *

[566] A. That is correct.

Q. And what would a hair and fiber examination have produced?

A. With regards to the hairs and fibers that I recovered from these various items of clothing they could be compared to the hair standards from the individuals.

Q. So, you could tell if they had been in contact or the same vehicle as another person?

A. It may yield that information through the examination.

Q. All right. Thank you, Ms. Taylor.

THE COURT: Thank you, Mr. Schwab. Mr. Tuck.

CROSS-EXAMINATION

BY MR. TUCK:

Q. I believe you indicated that you did find some blood an Benjamin Lilly's pants. It was on the back right portion of his jeans, is that correct? Back bottom portion?

A. That is correct.

[577] Q. Okay. So, it was an the back side of his jeans then?

A. That is correct.

Q. Were you able to amplify that? I didn't hear that, the, and he may have asked you that question. Were you able to amplify that blood that we're, that you found on the back of those pants?

A. No, no amplification results were obtained with that particular sample.

Q. Based on what you know about this situation, can you testify whether that's Benjamin Lilly's blood, and there, just so you'll know, there's been evidence that there was a goose that was killed and I'm going to show the witness Exhibit Eleven (11), blood on the back of the car, or a reddish material appearing on the back of the car and a dead goose. Can you tell us whether that blood came from that goose or can you tell us where that blood came from? Whose blood that is?

A. No, I cannot based upon my testing.

Q. Okay. Now, you indicated that on, in your report on October the lot, the request for examinations [578] of Seven (7) and Seven (7) (a) were terminated and can you tell me why they were terminated? Seven (7) and Seven (7) (a) being Gary Barker's clothing and shoes.

A. It was –

Q. Perhaps I can show you.

A. It's, it was my understanding that at that time, ah, the proceedings with regard to Gary Barker were completed.

Q. Okay. You had not done any blood testing on Gary Barker's clothes in August had you?

A. No, I had not.

Q. And, an a matter of fact, the clothing was not tested until, when in October was Gary Barker's clothing testified, tested? Tested, excuse me.

A. It was at the beginning of October.

Q. First week of October or the second week of October, if you recall?

A. I don't recall.

Q. Okay. Do you, did you have to work weekends to get that completed?

A. Yes, I did.

[579] Q. Okay. Did, was there any indications of why this had to be done?

A. I don't recall specifically.

Q. Do you recall generally why it had to be done? Why you had to work weekends?

A. Just to complete the testing.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: All right, sir.

MR. TUCK: Your Honor, no further questions for this witness.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any questions on redirect?

MR. SCHWAB: Yes.

REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. Now, when you did the spot found on the back of Ben Lilly's pants, was this a large stain or a small stain?

A. It was a very small stain.

Q. You did the presumptive test?

[580] A. Yes.

Q. Did you do the species testing?

A. No, I did not.

Q. Why not?

A. If I had done the species testing on this particular stain it would have consumed it and I would not have been able to even try the DNA testing.

Q. So, at that point, you were simply attempting to find what you could from that spot?

A. That is correct.

Q. And, of course, you can't say whether it came from a goose or a person?

A. That in correct.

Q. All right. Is there anyone else that does this at the Western Laboratory, or Western District Laboratory?

A. Yes.

Q. And do you have a backlog of cases?

A. Yes.

Q. Do you have any kind of priority system?

A. Basically, if there's a Court date set

* * *

[586] God?

MR. BARKER: Yes, sir.

THE COURT: Thank you, Mr. Barker. If you'll have a seat there and you'll be asked questions on behalf of the Commonwealth and questions on behalf of the defense, and if you will answer those questions, please. Mr. Schwab.

GARY WAYNE BARKER,

A WITNESS OF LAWFUL AGE, AFTER FIRST BEING DULY SWORN, DEPOSED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. SCHWABB:

Q. Will you tell the jury your full name, please?

A. Gary Wayne Barker.

Q. And how old are you, Gary?

A. Twenty (20).

Q. And how old were you in December of 1995?

A. Nineteen (19).

Q. Do you know someone by the name of Mark Lilly?

[587] A. Yes, sir.

Q. And who is he? if you'd tell the jury, please.

A. Ben Lilly's younger brother.

Q. And how long, do you know Mark, or did you know him before December?

A. Yes, I've known Mark a long time.

Q. And did you know Benjamin Lilly?

A. Ah, not as good as I did Mark, but I know him.

Q. How long had you known Ben?

A. Ah, I don't know. Ah, a couple of months before it happened, I guess. A month or so, I'm not sure.

Q. All right. Now, Gary, you were charged with essentially the same offenses, eight (8), I believe?

A. Yes, sir.

Q. And you've had your Court date?

A. Yes, sir.

Q. That was August the 26th of this year?

A. I believe so.

[588] Q. And you plead guilty, is that correct?

A. Yes, sir.

Q. And there was a plea agreement entered into?

A. Yes, sir.

Q. I'm going to show you this document. Look over it, please.

A. (Mr. Barker reviewing document). It's the same as what I had.

Q. All right. And is it the copy of your signature on there?

A. Yes, sir.

Q. In that your signature?

A. Yes, sir.

Q. All right. Ours is certified, so I hope that is a –

MR. TUCK: Mine is too.

MR. SCHWAB: Good.

Q. Now, I'm sure you haven't seen this, have you?

A. Ah, no, I don't believe so.

[589] Q. All right. Now, you came to Court on the 26th, is that correct?

A. Yes, sir.

Q. Of August. And you plead guilty to each charge?

A. Yes, sir.

Q. And do you recall what the agreement was?

A. Ah, to give true testimony against Benjamin Lilly.

Q. And what did the Commonwealth promise you?

A. Ah, huh, not a whole lot of anything really. A chance of maybe one day of getting out.

Q. And what was your sentence?

A. Fifty-three (53) years.

Q. On December the 5th, when before that date had you been with Mark?

A. Excuse me.

Q. Before the 5th, how long had you been with Mark Lilly before the 5th of December of 1995?

A. Ah, a few days.

Q. Where aid you live at that time?

[590] A. Ah, in Merrimac.

Q. And where was Mark living?

A. He was staying there with me and this other guy.

Q. And who was the other guy?

A. A. J. That's all I know him by.

Q. And did you have a car?

A. No, sir.

Q. Did Mark have a vehicle?

A. No, sir.

Q. Were you working at the time?

A. Ah, half and half, huh.

Q. How about Mark?

A. No.

Q. And where was Ben staying?

A. Ah, at his mother's.

Q. And where was that?

A. In Riner.

Q. In sometime or before of December the 5th, did you and Mark meet up with Ben?

A. Yes, sir.

[591] Q. And how did that happen?

A. Ah, we was, ah, went over to Mark's place and got with Ben and decided we was going to ride around a little bit because he had a car.

Q. So, you, how did you get out to Riner?

A. Ah, my aunt had took us.

Q. You and Mark?

A. Yes.

Q. And you met Ben there?

A. Yes.

Q. And what kind of vehicle did they have, or did you have?

A. He, he had, ah, ah, big, ah, Mercury Cougar, an older type.

Q. Was it working when you got there?

A. Yeah, half and half (laughing).

Q. I show you Commonwealth's Exhibit Number Number [sic] Two (2). A photograph of a vehicle in front of a convenience store. Is that the car?

A. Yes, sir.

Q. And you recall what day of the week this [592] was that you got together with Ben and Mark?

A. Ah, I, I believe, I'm not positive, I believe it was on a Sunday. Sunday evening, I guess.

Q. And what did you do that day?

A. Ah, drink a little, smoke a little.

Q. And by smoke a little, what do you mean?

A. Pot and

Q. Now, did there come a time when you ended up in Floyd County?

A. Yeah.

Q. Was that the same day or the next day?

A. That was the same day.

Q. And you went out there, where were you going? Anywhere in particular?

A. Ah, to, ah, Danny Sanders, Saunders.

Q. And how did you know him?

A. Me and Mark had drank with him. Parties with him a little bit.

Q. He knew your mother, I believe?

A. Yes. Yes, sir.

Q. You'd been there before?

[593] A. Yes, sir.

Q. Do you know if he had any liquor in the house?

A. Yeah, he always had liquor.

Q. And where did he keep it?

A. Ah, in his, he's got a home bar.

Q. Did he have any firearms?,

A. Ah, yeah.

Q. What kinds?

A. A .35 caliber rifle, a .38 caliber pistol and a 16 gauge shotgun.

Q. Now, did you know those guns were at his house?

A. Yes, sir.

Q. Had you seen them before?

A. I had seen the pistol and the rifle.

Q. Had Mark been to the home before?

A. Yes, sir.

Q. Do you know if held seen the weapons?

A. Yes, sir.

Q. Had Ben ever been there before?

[594] A. No, sir.

Q. So, how did you end up at Mr. Sanders or Mr. Saunders?

A. We just drove up there and was going to drink a little bit with him and he wasn't there and we decided just to go on in and help ourselves.

Q. And how did you go in?

A. Busted out the front glass in the door.

Q. And went inside?

A. Yes, sir.

Q. Did you all stay there for a while?

A. Nah, we was in and out pretty quick.

Q. All right. Did you take anything while you were there?

A. Yeah.

Q. What did you take?

A. Nine (9) liters of liquor and three (3) guns.

Q. Different kinds of

A. Yeah.

Q. Liquor?

[595] A. Yes, sir.

Q. Were most of them full or

A. Yeah, they was all full.

Q. And the guns?

A. Ah, all of them had a few shells in them.

Q. Okay. Was anything else taken besides the guns and the liquor?

A. A safe.

Q. Where did that come from?

A. Ah, behind his bar.

Q. What kind was it?

A. Ah, it was, I guess like a fireproof safe

Q. What was it made out of, if you know?

A. Ah, I'm not sure.

Q. Okay. And what did you do with those items after you took them?

A. Ah, we was, we was drinking liquor and the safe, ah, we got into it and it wasn't anything worthwhile in it.

Q. Now, where did you take the safe to get into it?

[596] A. Ah, to Mark's sister's.

Q. Was she home at the time?

A. No, sir.

Q. And what did you do with it there?

A. Took a splitting mall and busted it open.

Q. And did it come open?

A. Yes, sir.

Q. Was there anything in it?

A. Yes, sir.

Q. What kinds of things were in it? Do you remember?

A. Ah, car titles, ah, old money, old stamps

Q. Were there any knives in it?

A. Ah, I believe there might have been. I'm not sure, I'm not positive.

Q. Now, after you split it, had opened it, what did you do with the things inside?

A. Ah, well, anything that was worth keeping we split up and the rest of it we threw in, ah, in, ah, like a creek.

Q. All right. Now, was it daylight or dark [597] when you got there?

A. It was dark.

Q. Did you go anywhere else from there?

A. Ah, we went to Blacksburg.

Q. Do you recall going to Radford at anytime that first night?

A. Yes, I do. We went to, ah, Warren Nolen's.

Q. Now, were the three (3) of you still altogether?

A. Yes, sir.

Q. You're still in Ben's car?

A. Yes, sir.

Q. Who was driving at that point?

A. Ah, at that point, Mark was driving.

Q. All right. And had any of the liquor been opened at that point?

A. Yeah, all of it had been opened.

Q. So, you went to Radford. Did you know Mr. Nolen?

A. No, I didn't.

[598] Q. Did you know Ms. Quesenberry that lived there also?

A. No, I mean I met them that night, but I didn't know them before.

Q. Okay. And you all got there and what happened after you got there?

A. Ah, we drink a little bit and tried to trade the guns for some dope and, ah, they didn't have enough, so.they burnt a little bit with us and then we left.

Q. And what do you mean, burned a little bit with us?

A. Ah, we smoked a little of pot and then we left.

Q. All right. Did they ever ask you to take the guns outside, or do anything with the guns?

A. Ah, his, ah, that lady there didn't want us, want them around him because he had, Warren had got out of the penitentiary and she didn't want no guns around him.

Q. So, did you all do anything with the guns?

[599] A. Ah, we laid them down until we was ready to leave in the corner.

Q. Do you remember doing anything with the things from the safe while you were there?

A. Yeah, we tried to sell a little bit of the stuff.

Q. The coins or whatever?

A. Yeah, the coins and the stamps.

Q. Did you sell any?

A. Ah, not that I remember.

Q. All right. Where did you all go from there?

A. Ah, to Blacksburg. Back to A. J.'s.

Q. And who went back to A. J.'s?

A. Me, Mark and Ben.

Q. And what happened when you got there?

A. Ah, we drank, and drunk, that's about it. We sat and drank.

Q. And where did you spend the night that night?

A. A. J.'s.

[600] Q. And how late did you drink, if you know?

A. Ah, I don't, 2 or 3 o'clock in the morning.

Q. Now, Mark's about your age, right?

A. Yes, sir.

Q. Maybe a little older?

A. Yeah, he's a year older.

Q. And did everybody stay there at the trailer?

A. Yeah, me, Mark, Ben and A. J.

Q. And then what happened in the morning?

A. Ah, we got up and started drinking some more.

Q. How much did you have left at that point?

A. Ah, probably two and a half (2-1/2), three (3) fifths all total.

Q. You drank that much before of the other eight (8) or nine (9) bottles? That's all you had left?

A. Yeah.

Q. Did anybody else drink with you other than –

[601] A. Yeah.

Q. The three (3)?

A. We all, it was me, Mark, Ben and A. J., ah, but he didn't drink with us the next morning though.

Q. And what did you all do the next morning?

A. Ah, we rode around, rode back roads in the Shawsville, Elliston area.

Q. Okay. Did you have your alcohol with you?

A. Yes, what we had left of it.

Q. Were you drinking?

A. Yes.

Q. And did you stop any place down in the Shawsville area?

A. Yeah, we stopped at a store.

Q. And what kind of store?

A. Ah, it's a little small store.

Q. And what did you do there?

A. Ah, stole a tank of gas.

Q. And by stole a tank of gas, you mean

A. Just pumped and left.

Q. Who was driving?

[602] A. I was.

Q. Were Ben and Mark with you?

A. Yes, sir.

Q. You went on from there, did you stop anywhere else in the area, not where there was a business or a house, it was Just some place to stop, and do anything else?

A. Yeah, we went down in, ah, ah, Shawsville down in Boner's Run.

Q. Okay. And what did you do there?

A. Ah, I fired the rifle and Mark fired a pistol and then Ben fired it and then we rode around some more and drank some more. Just fired it into a tree.

Q. Now, by the rifle, I show you this. Is this the rifle he fired?

A. Yes, sir.

Q. And this, and where did this come from?

A. Danny, Denny's.

Q. And how many times did you fire it?

A. Fired it once down there, probably a total of three (3) times altogether before the night was out.

[603] Q. And who fired the pistol there?

A. Ah, Mark and Ben.

Q. And what did they shoot at?

A. Just the tree.

Q. Now, how many rounds of ammunition did you have for the rifle?

A. Ah, at least five (5).

Q. And do you know how much there was for the pistol?

A. Ah, yeah, it was, ah, it was fully loaded.

Q. So, there were six (6)?

A. Yeah, or eight (8), whatever, how many ever it holds. I don't remember.

Q. Do you know if you found a bullet some place else?

A. Yeah, there was a, a silver one at A. J.'s and we picked it up too.

Q. Now, was that the only time you fired

A. No.

Q. The guns in that area of the county?

A. No. We went down to Alleghany.

[604] Q. Okay. And what happened there?

A. Ah, the shotgun got fired and the rifle got fired.

Q. Were they fired at anything in particular?

A. Yeah, at some goose, geese.

Q. And where were they?

A. At, in this church yard.

Q. And what did you fire?

A. I fired the rifle again.

Q. And do you know who fired the shotgun?

A. I'm pretty sure Mark did.

Q. Did you have either or both of the geese?

A. Ah, one (1) of them was flopping, it got away, but the other one (1) died.

Q. And what did you do after it died?

A. Ah, threw it up in the trunk.

Q. Do you know who carried it to the trunk?

A. I don't remember.

Q. I show you Commonwealth's Exhibit Number Eleven (11), the trunk, a photograph of a trunk with it open with a goose in it. Is that the goose that was [605] killed and placed in the trunk?

A. Yes, sir.

Q. Do you recall about what time of day that was?

A. No, sir.

Q. Was it light?

A. Yeah, it was still light out, yeah, for sure.

Q. So, you had the goose, you had a full tank of gas by that time, right?

A. Yes, sir.

Q. Where did you go from there?

A. Ah, rode some more back roads.

Q. And where did you end up?

A. Ah, we went to a trailer park, ah, across from the, ah, the rock quarry in Blacksburg.

Q. Did you go there to see anybody in particular?

A. Yes, sir.

Q. And who did you go to see?

A. Ah, Billy Roop.

[606] Q. You all three (3) were still together at that point?

A. Yes, sir.

Q. Where were the guns at that point?

A. In the car.

Q. And what did you do at that trailer park?

A. Ah, tried to trade a pistol, for some dope.

Q. With?

A. Excuse me.

Q. Who did you try to trade it with?

A. Billy.

Q. You didn't make the trade?

A. Ah, no.

Q. Okay. Did you stay in the trailer park long after that?

A. Ah, yeah, we went by, ah, two (2) more trailers.

Q. And what were you doing there?

A. Ah, basically, looking for some dope.

Q. Did you all three (3) end up leaving the trailer park?

[607] A. Yes.

Q. How much later did you leave?

A. We was probably there, I don't know, around, around about an hour just give or take a few minutes.

Q. Were you drinking during that time?

A. Yes.

Q. And where did you go from there?

A. Ah, riding around again.

Q. And where did you go after that, if you remember?

A. Ah, we went to Cowboys.

Q. Now, what's Cowboys?

A. It's a bar in Blacksburg.

Q. Is that near Hokie Honda or behind Hokie Honda?

A. Yes, it's behind Hokie Honda.

Q. And all three (3) of you together then?

A. Yes, sir.

Q. And what did you do there?

A. Ah, me and Ben got out of the car and, ah, [608] and, ah, a guy got in the car with Mark talking, trying to score some dope.

Q. Now, did you ever have those, any of the guns out there?

A. Yeah, I –

Q. Which guns?

A. Ah, I know for sure the rifle was. I don't remember if the pistol or the shotgun was, but I know the rifle was.

Q. And who had that out?

A. I did.

Q. And what did you get it out for?

A. Ah, I was trying to sell it.

Q. And what did you do with it after you got it out?

A. I showed it to, ah, Michael Hixon and then I put it back.

Q. How long did you stay there?

A. Ah, I don't know. Twenty (20) or thirty (30) minutes, it wasn't long.

Q. Did you all buy anything at the bar?

[609] A. No.

Q. And where did you go from there?

A. Ah, through Merri –, we went through Merrimac.

Q. All three (3) of you still together?

A. Yes.

Q. Who was driving?

A. I was.

Q. Where was everybody else?

A. Ah, Ben was in the middle and Mark was in the passenger, beside the door.

Q. All in the front seat?

A. Yeah.

Q. Do you know where the guns were then?

A. Yeah, I had the rifle wedged between the seat and the door and, ah, the shotgun was in the floorboard and, ah, I don't remember, one (1) of them had the pistol laying in the seat with them.

Q. All right. You went through Merrimac, correct? After Cowboys –

A. Yeah.

[610] Q. You were driving. Was it getting dark by that point?

A. Yeah.

Q. And when you came out of Merrimac, where did you come out?

A. Ah, on Price's Fork.

Q. All right. And where did you go after you got on Price's Fork?

A. Up to where the car tore up.

Q. Were you going into Blacksburg or away from Blacksburg?

A. Yeah, we was going into Blacksburg.

Q. Where were you going at that point in time?

A. University.

Q. University Trailer Park?

A. Yes, sir.

Q. And what were you going there for?

A. The same thing we was at the other trailer park, looking for some dope.

Q. And what happened as you were going along [611] Price's Fork Road?

A. Ah, the car tore up.

Q. Do you know where it was near?

A. It was near the store, ah, –

Q. Did you make it through the stop light there?

A. Yeah, as a matter of fact we did and I had, and it stopped going up the hill on the other side of the light.

Q. All right. Then what did you do?

A. I drifted it back down to where it was setting when y'all found it.

Q. All right. And what did Mark and Ben do?

A. Ah, well, we, ah, was trying to take the tags off and get the liquor and the guns out of the car.

Q. What did, let me back up a second. What were they doing while you were drifting the car back?

A. Guiding me.

Q. All right. And you went a long way, if I remember correctly?

A. Yeah.

[612] Q. Did you turn –

A. On oncoming traffic.

Q. And did you turn it off onto a side lane?

A. Yeah.

Q. And that's where it stopped?

A. Yeah.

Q. Was it on the right side or the wrong side of the road then?

A. It was on the wrong side.

Q. Okay. Then you said you tried to take the tags off?

A. Yeah.

Q. Were the tags taken off?

A. That's what we, we was trying, to get the tags off and I don't remember if they come off or not and we was getting the guns and the liquor out of the car.

Q. And what were you going to do with them?

A. Ah, well, we would stash them in the woods or, or to steal us a car and get out of there.

Q. Okay. And who had the rifle at that point?

[613] A. I had the rifle.

Q. Who had the shotgun?

A. Ah, Mark had the shotgun.

Q. And who had the pistol?

A. Ben had the pistol at that time.

Q. How did Ben end up with the pistol after the car stopped?

A. He told me and Mark to walk towards some trees in the parking lot of the store and, ah, he would get us a car.

Q. I show you Exhibit Number Two (2) again, the car. That's where it stopped.

A. Yeah, well, it stopped up there (pointing) and then we drifted it back over there (pointing).

Q. All right. Now, which way, you said you were walking towards the trees?

A. Yeah. Okay, it would be that way (pointing) there is trees and, that right there is trees (pointing).

Q. All right. Were there cars in the parking lot?

[614] A. Yeah.

Q. And did you see where Ben went?

A. Yeah.

Q. Where did he go?

A. Over to that boy.

Q. Was the boy near a car?

A. Yeah.

Q. And what was he doing?

A. Just looking at his tire.

Q. Was the car running, or do you know?

A. Ah, I think it was running.

Q. Was he looking at a front tire or back tire?

A. Front tire.

Q. Driver's side or passenger's side?

A. Passenger's side.

Q. And Ben went up to him?

A. Yes.

Q. And where were you all then?

A. Walking towards the pine trees.

Q. And did you see what happened then?

[615] A. Yeah, ah, he hollered – come on – and went over that way. He had the gun pointed at him and, ah, me and, I got in the passenger's side of the car and Mark got in the back of the car in the passenger's seat and Ben told the boy to get beside Mark and then Ben got behind the wheel.

Q. All right. Now, when you came up, was the person still standing by their front tire?

A. Ah, no, he was more in front of the car closer to Ben.

Q. And where was Ben at that point?

A. Ah, right at the right, at, right at the driver's front fender.

Q. Did you see if Ben had anything in his hand?

A. Yeah, he had the pistol in his hand.

Q. And what was he doing with the pistol?

A. Ah, just telling the guy to come on and give me your money or something sort of in that, of somewhere in that area.

Q. And did you see anything change hands [616] between the two (2) of them?

A. Yeah, I seen him hand him his wallet.

Q. All right. Did you see any bills or anything?

A. Yeah, it looked like maybe just like one (1) –

MR. TURK: Your Honor, I would object. I believe he's leading the witness through the last couple of questions.

THE COURT: All right, sir. Just rephrase them. You don't have to repeat the ones that have already been answered.

Q. And then the person got in the vehicle?

A. Yes.

Q. What did you and Mark do when the car doors opened?

A. We got in. We got in the car.

Q. Did you look towards the person?

A. No, looked away from him because of the overhead light in the car.

Q. He got in the back seat?

[617] A. Beside Mark.

Q. Ben was driving at that point?

A. Yes, sir.

Q. And where did you go?

A. We started down towards Whitethorne.

Q. Back down Price's Fork from where you had come?

A. Yes.

Q. And where were you going?

A. Ah, just basically just down the road.

Ah, you, we just was going to drop him off in, where he'd have to walk to get to a phone and we ended up in Whitethorne.

Q. All right. Did the person talk to you all while you went down?

A. Yeah, he, he, ah, told us that, ah, he'd have of, ah, gave us a ride if we had of asked and, ah, and told us if we would go back and get his friend, then, ah, back at the store, then, ah, he would take us wherever we needed to go.

Q. Did you all turn around?

[618] A. No.

Q. Ben was still driving at this point?

A. Yes, at this point.

Q. And you pulled into Whitethorne?

A. Yeah.

Q. And what happened when you got there?

A. We'd told him to close his eyes so we could get out of the car because –

Q. Who is we?

A. Me and Mark. Because he had already seen Ben's face and, ah, we told him to close his eyes.

Q. And did you and Mark then get out?

A. Yeah, when he closed his eyes.

Q. And who else got out?

A. Ben got out.

Q. Now, did anybody have any firearms at that time?

A. Yeah, the, ah, the pistol was, ah, in, ah, the front of Mark's pants.

Q. Did Mark have the pistol back then?

A. Yeah. It went back and forth between [619] hands.

Q. And Mark was in the back seat with him?

A. Yes.

Q. And what did you do with the rifle?

A. It was still laying in the car.

Q. What part of the car?

A. Ah, in the front where I was sitting. In the front passenger's, in the floorboard.

Q. Do you know where the shot gun was?

A. Ah, I think it was in the floorboard too, in the back floorboard.

Q. Now, the shotgun, do you recall how much ammunition you had for that?

A. A, ah, I believe, I'm pretty sure we only had two (2) shells for that and one (1) of them was shot at the goose.

Q. Everybody got out at Whitethorne?

A. Yes, we sure did.

Q. Was the car still running?

A. No.

Q. Were the lights on?

[620] A. Yeah. The, ah, not the, ah, not the headlights, but the light, marker lights, parking lights.

Q. So, the headlights were on?

A. No, the headlights wasn't on. It was the parking lights.

Q. The little yellow ones?

A. Yeah.

Q. The warning lights?

A. Yeah, on the side.

Q. And which way had you all come in? If you look over here to this diagram, down to the end is across, the railroad tracks is apparently where you enter, is that correct?

A. Yeah, it's only one (1) way in there.

Q. Okay.

A. And one (1) way out.

Q. And where did you go after you went in?

A. Ah, there was a big stack of railroad ties and stuff and that's all I remember.

Q. If I could just show you Commonwealth's Exhibits Thirty (30), Twenty-nine (29), and I'm sorry, I

[621] can't tell if it's Twenty-eight (28) or Thirty-eight (38), photographs of that area in the daylight. Do you recognize anything in these pictures?

A. Well, I thought it was railroad ties, but, yeah, the house.

Q. Okay. Would you point it out to the jury, the house on Number Thirty (30)?

A. Yeah. (Pointing).

Q. And this big stack –

A. Yes.

Q. Is what you call the railroad ties?

A. Yes, it was dark really.

Q. Now, whereabouts did you have the car?

A. Ah, it would be back this way (pointing) back towards there.

- Q. Okay. If you look in this picture, Number Twenty-nine (29).

MR. SCHWAB: Do you need to see this?

MR. TUCK: I'd like to. The witness is being examined and I have a right to see which, where he's at, and what he's –

[622] THE COURT: You can have a, you can look at it. Go ahead.

A. Okay. It was back this way somewhere (pointing).

Q. All right. The house would be down here or the –

A. Yeah.

Q. Or the train station, whatever?

A. Yeah, it was across there.

Q. And were you all in one side of the car?

A. Yeah.

Q. Which side was that?

A. That, ah, that would be the driver's side. Once we'd all got out.

Q. What happened after you got out?

A. Ah, Mark told him to walk and, ah, (pausing) and Ben told him to take his clothes off.

Q. Did he take his clothes off?

A. Down to his underwear and his socks.

Q. What happened to his clothes?

A. They got threw in a river.

[623] Q. What happened to him there after he took them off, if you know?

A. At the time, I thought it was funny. I guess we all did, and, ah, –

MR. JENKINS: Well, Your Honor, we object to him speculating on what the other people thought it was.

A. Ah, –

THE COURT: Yes, but I mean he can certainly testify to what –

MR. JENKINS: Said it was funny as far as he was concerned.

A. Basically, him agreeing though.

THE COURT: To, he would testify to what he felt.

MR. JENKINS: I was making an objection, son, to the Court.

THE COURT: Go ahead and answer the question that was asked, but just limit your answer to your feeling.

A. Ah, well, all right, I thought it was sort [624] of funny and, ah, because he'd have to walk to a, to find a phone in his underwear and his socks, I mean.

Q. Now, did you have any conversation with him before Mark told him to go on or Ben told him to take his clothes off?

A. I don't recall.

Q. And which way was he walking?

A. Ah, towards, ah, the same way we came in, that way. There's only one (1) way out and one (1) way in.

Q. All right. And how far had he walked after his clothes were taken off?

A. Fifty (50) yards or so, or fifty (50) feet or so, I'm not sure. It wasn't far.

Q. And after he started walking, what did you do?

A. I got in the driver's seat of the, of the car.

Q. And what did Mark do?

A. He got in the passenger's seat.

Q. What did Ben do?

[625] A. Ben got in the back and he told Mark to give him the pistol back and he got out of the car and run up to him (pausing) and he turned him around and shot him.

Q. Did you hear the gun shot?

A. No, I seen flashes.

Q. One (1) or more?

A. More.

Q. And what happened to this person as the flashes went?

A. I saw him throw up his arm (describing).

Q. And then what?

A. (Pausing) Fell on the ground. Just staggered back and fell on the ground.

Q. Did Ben come back to the car?

A. Yeah.

Q. Right away or did he delay?

A. Came back to the car.

Q. And where did he get in?

A. In the, back in the back.

Q. And after he got inside, was anything [p. 626] said?

A. Yeah.

Q. And what was said?

A. Me and Mark was asking him why did he do it back and forth and he said – because I've been in the penitentiary and I ain't going back. He said that boy saw his face.

Q. Did you leave this area right away?

A. Yeah.

Q. Who was driving?

A. I was.

Q. And where did you go?

A. It was some back roads. We winded, well, we went to the river first down in McCoy.

Q. Did Benjamin Lilly say anything else there at the scene other than what you testified to?

A. As we started moving the car a little bit and as the car started moving some he, he asked, he said, – give me a fuckin' beer.

Q. You went on down the road?

A. Yeah.

[p. 627] Q. Did you ever get any beer?

A. Yeah.

Q. And where did you do that?

A. Ah, with the money that, that, that guy had gave Ben. He went into the store. That –

Q. Did you and Mark go in?

A. No.

Q. And what did Ben come out with?

A. He come out with ah, I don't remember if it was a twelve (12) pack or a case and a pack of cigarettes.

Q. What kind of beer, if you remember?

A. Busch Light, or Busch, one of the two.

Q. Who was driving then?

A. I was.

Q. And where did you go from the store with the beer?

A. Down to the river, down to McCoy River.

Q. And what did you do down there?

A. Threw away anything that might have our prints on it.

[p. 628] Q. And what did they include?

A. Some clothes, backpack, the piece of plastic that covers the speedometer. I don't remember all.

Q. Why did you throw away the piece of plastic?

A. Because that I had touched it.

Q. Now, did anybody, was anybody wearing gloves?

A. Yeah, we all three (3) had gloves.

Q. Well, what point did you end up –

A. Opening a beer? My gloves was fat and I couldn't open the beer.

Q. And then how did you end up touching the plastic?

A. I don't remember, but I remember touching it, so I knocked it out and threw it over the hill.

Q. And whose clothes did you throw away?

A. The boy's.

Q. And the backpack with, do you remember anything about that?

[p. 629] A. It, it had some books of his or something and it was heavy.

Q. Where was it in the car?

A. I don't remember if it was in the floorboard or in the trunk. I don't remember.

Q. Okay. Do you remember what color it might have been?

A. No.

Q. Was it light or dark?

A. It was a darker color, I believe.

Q. Lot me show you this. Do you recognize this?

A. Yeah.

Q. And what is it, please?

A. That's the boy's backpack.

Q. And you threw that into the river?

A. Yeah.

Q. Were you the only one throwing things in the river?

A. No.

Q. Who else was?

[p. 630] A. It was all three (3) of us.

Q. So, at that point, you had the vehicle, you had the beer. Did you still have all three (3) guns?

A. Yes.

Q. Had you gotten rid of those?

A. No, we still had all three (3) guns.

Q. And who drove away from that place?

A. I did.

Q. And where did you drive to?

A. To the first store that got robbed.

Q. Is that over in Giles County?

A. Yeah.

Q. Okay. Who went, where was everyone else in the car?

A. Mark was still in the passenger's seat and I was driving and Ben was in the back.

Q. Okay. And what happened as you got to the store?

A. Well, at first we passed it and then turned around and went back and, ah, we was arguing on who was going to carry the gun in.

[p. 631] Q. Now, why would you want to carry the gun in?

A. We was going to rob it?

Q. Why were you going to rob it?

A. To get money to get out of town.

Q. Did you have any money with you?

A. No, not that I remember.

Q. Do you know if Mark had any?

A. No, I don't think so.

Q. Did Ben indicate whether he had any other than what he bought the beer with?

A. If it was any change off of it, that would be all he had.

Q. Where did you all park in relation to the store?

A. Right out in front of it.

Q. Had you, while you were talking about getting money to get out of town, did you talk about some place to go?

A. Yeah.

And where were you going?

[p. 632] A. Ah, Ben said he knew some people in West Virginia. That we could hide there for a few days.

Q. So, who all ended up going into the store?

A. All three (3) of us.

Q. Do you remember who went in first?

A. Ah, no.

Q. Who ended up carrying the gun?

A. I did.

Q. And why did you take the gun?

A. I really don't know. I don't know.

Q. Did Ben say anything about taking the gun inside?

A. Yeah, he said he did what he had to do already. Something in that area.

Q. So, you all three (3) went inside?

A. Yes.

Q. What did you do?

A. Ah, took the gun and showed it to them and told them to give up the money.

Q. And when you said them, there was more than two (2) people in the store?

[p. 633] A. Yeah, it was a old man and an old lady.

Q. And who was at the counter?

A. The old man.

Q. And where was the lady?

A. In the back of the store towards the, ah, ah, coolers.

Q. You went to the counter, took out the gun?

A. Yeah.

Q. Which gun was it?

A. It was the pistol.

Q. And what did you do after you took the gun out?

A. I told them to give me the money.

Q. Did you tell them to do anything else? To lay down –

A. To get down on the floor.

Q. Did he do that?

A. Yes.

Q. Who went around to the cash register?

A. Mark.

Q. Did it open?

[p. 634] A. No, the guy had to get back off of the floor and open it.

Q. And the cash register came open?

A. Yeah.

Q. And who took the things out of it?

A. Mark.

Q. You still had the pistol?

A. Yes.

Q. Did you still have it out?

A. Yes.

Q. And did you take anything?

A. Ah, ah, the, ah, the stereo.

Q. Okay. The little radio –

A. Yeah.

Q. Boombox?

A. Yeah.

Q. What else besides what was in the cash register did you all take there?

A. Ah, some more beer and some gloves and stuff. I don't remember exactly what all it was.

Q. Were the gloves on a display?

[p. 635] A. Yeah. Where I was standing, I think I grabbed them too.

Q. Okay. And then where did you go after everybody grabbed what they were grabbing?

A. Ah, back to the car and, ah, Ben was slow coming out. I don't know why, but he was slow coming out.

Q. And you all got back in the car?

A. Yeah.

Q. Where were you?

A. I was driving again.

Q. And where was Mark?

A. Ah, he was in the passenger's seat.

Q. And where was Ben Lilly?

A. In the back seat.

Q. Who had the pistol?

A. Ah, at that time, it was laying in the seat again.

Q. Where was the rifle?

A. Ah, in the back floorboard.

Q. And the shotgun?

[p. 636] A. In the back floorboard.

Q. Where did you drive after you left that little store?

A. To the second store that got robbed.

Q. Did you go anywhere else?

A. Yeah, we counted the money under a trestle, but I don't remember exactly where it was at and it wasn't enough.

Q. It wasn't enough for what?

A. To get us out of, out of town to hold us off.

Q. After you counted it, what did you do with the money?

A. We each took our share.

Q. Do you remember about how much that was?

A. Probably close to, right at a hundred dollars a piece.

Q. Was there anything other than cash?

A. Yeah, there was, ah, ah, food stamps and I don't remember if there was any checks or not.

Q. So, you counted the money and divided it [p. 637] up. What did you do with yours?

A. I stuck it in my front pocket.

Q. And where did you go from there?

A. Ah, to the next store.

Q. Was that in Pembroke?

A. Ah, yeah. Ah, Bill Williams' store.

Q. It's a sort of right there on the main road?

A. Yeah.

Q. You pulled in, and where did you park?

A. Ah, we were, well, out front.

Q. Okay. And what happened after you got there?

A. Ah, we all got out and, ah, again we was arguing who was going to do it and, ah, I said, you know, I'll do it, you know, basically, so I grabbed the pistol again and Ben got under the driver's seat and me and Mark went in the store.

Q. And what happened when you went in the store?

A. Ah, I took the gun out and I told her to give me the money.

[p. 638] Q. And there was a woman working?

A. Yeah.

Q. And did she give you the money?

A. No.

Q. Did she tell you why she wouldn't give you the money?

A. She said they didn't have any.

Q. And who else was in there with you?

A. Mark.

Q. Where did you have the pistol?

A. Out in front.

Q. In your hand?

A. Yeah.

Q. And then what happened?

A. Ah, Bill Williams came into the store and grabbed me.

Q. From behind, the side or the front?

A. From behind, from like my side, he rushed me.

Q. And then what happened?

A. I, I got loose from him and, ah, and, ah, [p. 639] she said, – here take it – and she threw a bag of quarters or some, a whole bunch of change onto the counter and we grabbed it and run out of the store.

Q. Now, these coins, were they in wrappers?

A. Yeah.

Q. Like they come from the bank?

A. Yeah.

Q. After you got loose from Mr. Williams, did you tell him anything?

A. No, not that I recall.

Q. Did you do anything with the pistol at that point?

A. No, not that I recall.

Q. You ran outside and then what?

A. Ah, jumped in the car and, ah, that's when, when it tore up a little ways below the store.

Q. And this is the car you got from the convenience store in Blacksburg?

A. Yes.

Q. Then where did you jump in the car?

A. I jumped in the back that time and Mark [p. 640] was in the passenger and Ben was driving.

Q. All right. And who grabbed the change inside?

A. I don't remember if it was me or Mark.

Q. And you got in the car?

A. Yeah, and, ah, –

Q. Where did you go from there?

A. To where it tore up across the bridge, Pembroke bridge.

Q. Was there anyone behind you?

A. Yeah, Bill Williams. The reason I know it was him because the car was sitting in the parking lot the one, the one that we went and robbed, when we started to rob the store. I recognized it when it got behind us.

Q. And how far did it follow you?

A. It, it got, it was following us across the bridge.

Q. Did you do anything about it following you?

A. Yeah, I took the rifle, I was in the back of the seat and I took the rifle and I pointed it out the [p. 641] window, pointed it up into the air and fired to let him know we had guns and, ah, he backed off.

Q. How much further did you go before the car stopped?

A. Not far.

Q. Now, did you, did the car stop on its own or did it have some kind of problem?

A. It, ah, it, ah, I guess the engine locked up. It just stopped on us.

Q. What did you do with the car?

A. We was getting stuff out of it, ah, and Randy Tilley came around the corner and Mark run over the hill and I run over the hill and I was, and, ah, I thought Ben was behind us, but he wasn't and I fell onto some rocks and Mark kept going and I set up on a rock and I seen them arresting Ben.

Q. Now, you said you were getting things out of the car?

A. Yeah.

Q. What were you getting out the car?

A. The stereo and the beer and stuff.

[p. 642] Q. And what were you doing with them?

A. Or the cigarettes and stuff. Just getting like the evidence out of the car.

Q. And what were you doing with it after you got it out?

A. Just throwing it.

Q. Do you remember any fires?

A. Ah, no, I don't.

Q. And what did you take with you?

A. Ah, I had the rifle and I still had the money in my pocket.

Q. All right. Did you have any coins with you at that time, or do you remember?

A. I don't remember.

Q. How far away had you run before you fell?

A. Not far. Ah, ten (10) yards or so, I guess. Ten (10) or fifteen (15) yards.

Q. Towards the woods?

A. Yeah, towards the woods.

Q. Were you in the woods?

A. No, I was in a ditch, a big ditch.

[p. 643] Q. Could you see where the car was?

A. Yeah, I could see them walking back and forth past it.

Q. And you saw Mark, I mean you saw Benjamin?

A. Yeah, I saw them arresting him.

Q. Where was he when you first noticed him?

A. He was standing beside, the, on the passenger's side of the car at that time and he had his hands in the air and they made him drop to his knees.

Q. How long did you stay there?

A. Till they got me.

Q. Do you know how long that was?

A. Nah, five (5) or ten (10) minutes.

Q. Could you see all the officers?

A. Yeah, I watched them walk back and forth past me.

Q. Were their headlights on?

A. Yeah, and the blue lights and everything else.

Q. And how did you end up in custody?

A. Ah, one of them had heard me.

[p. 644] Q. Heard you what?

A. Ah, ah, I was sending a message to my Mom.

Q. How were you sending a message to your Mom?

A. I was, just, just told them to tell my Mom I loved her and that was it. I had the gun in my mouth. I was going –

Q. That was the deer rifle?

A. Yes.

Q. Were you still sitting?

A. Yes.

Q. And where was the butt of the gun?

A. It was at my feet.

A. And the top was in your mouth?

A. Yes.

Q. Was the hammer cocked?

A. Yes.

Q. You didn't pull the trigger?

A. No.

Q. Why did you want to pull the trigger?

A. (Pausing) From what I seen and, and, and, [p. 645] and for what I did.

Q. Why didn't you pull the trigger?

A. Because something deep down was telling me that, ah, that if I, if I had of then they would have just put it on me and all of it on me and, you know, I didn't want my family to hate me, you know.

Q. So, you put the rifle down or threw it down?

A. Yeah, I threw it behind me.

Q. Now, when you were out there, did you hear, did the police have loud speakers?

A. Yes.

Q. Did you hear them calling out names?

A. Yeah.

Q. Did they call out your name?

A. No.

Q. Did they call out Mark Lilly's name?

A. No.

Q. Do you remember any of the names they called out?

A. Yeah. They called out ah, ah, ah, [646] Michael, ah, Michael Rader and, ah, Chris, ah, Chris, ah, ah, I'm not sure what his last name is. It's Ben and Mark's brother-in-laws. I –

Q. They weren't with you?

A. It's Chris Carter and Michael Rader. No, they wasn't with us.

Q. And after you were taken, into custody, where did they take you?

A. Upstairs.

Q. Did they take you first to the police car there at the scene?

A. Oh, yeah, they took me to the police car.

Q. All right. And then you went back to their station?

A. Yeah.

Q. Who took you back?

A. Gary Price.

Q. Did the other cars come back? Did Ben come back with you at that time?

A. No.

Q. Did you see Mark again before you left the [647] scene where the car broke down?

A. No. They, ah, they, ah, brought him in last. They found him walking on the side of the road and I didn't see him until early the next morning.

Q. All right. Did you agree to talk to the police?

A. Yeah.

Q. And you said, is that what you meant by upstairs?

A. Yeah.

Q. And you spoke with Lieutenant Price, is that right?

A. Yes.

Q. And what did he ask you about?

A. He just asked us what happened, asked me what happened and, that night, what was going on.

Q. Did you tell him anything about the names they were calling out?

A. Yeah, they asked me was that who I was with and I told them, no. I told them I was with Mark and Ben Lilly.

[648] Q. All right. Now, did Lieutenant Price, did he ask you about anything other than Giles County?

A. Yeah, he asked where did the car come from.

Q. And what did you tell him?

A. I told him where the car come from. I told him where to find the boy at.

Q. Did he ask you about the boy?

A. He, he was working around to it.

Q. Do you recall drawing a map for one of their police officers?

A. Yeah, I believe it was for Ron Hamlin and Bobby Fleet.

Q. And what was it a map of?

A. To where to find the boy at.

MR. TUCK: Your Honor, I would just note that this wasn't provided in discovery beforehand.

THE COURT: All right, sir. You may have time to review it fully, if you wish.

MR. TUCK: Thank you, Your Honor.

MR. SCHWAB: Your Honor, if the Court [649] may note, that was in our file and has been since the Sheriff's Office first provided us with reports.

Q. Do you recognize that?

A. Yes.

Q. And whose handwriting is that?

A. Ah, I believe, I believe it's mine and, ah, ah, Ron Hamlin's.

Q. Did you draw it yourself?

A. Yeah, I drew it, but I told him, told him what they was and he was labeling them.

Q. The bottom part here (pointing)?

A. That, that was me.

Q. That word is railroad ties?

A. Yeah.

Q. And what's the X for?

A. That's where he was at.

Q. Did you know his name?

A. Yeah, he had, he had said his name. His first name.

Q. And what was that?

A. Alexander.

[650] MR. SCHWAB: Your Honor, we'd move for admission of the diagram that Gary Barker has indicated he wrote part of?

THE COURT: Any objection?

MR. TUCK: No objections, Your Honor, and if Mr. Schwab indicated it was in his file, I'm sure it was.

THE COURT: All right, sir. It's admitted without objection.

CLERK: Commonwealth's Exhibit Number Forty-five (45) is a handdrawn map.

Q. Now, what did you think was going to happen after you told investigator Price about what you'd done in Giles and where the car and, came from and where to find Alexander?

A. I knew I wasn't getting out. I knew that much.

Q. Did you talk to any more officers that night?

A. Ah, yeah, I talked to a lot of officers.

Q. Or did you talk to someone from Blacksburg [651] named Sergeant Goodman?

A. Yeah, Donnie Goodman.

Q. Did you talk to Investigators Hamlin and Fleet?

A. Yes.

Q. Were you up most of the night?

A. Yes.

Q. Between talking to the officers, where did they keep you?

A. In the same place.

Q. Which was?

A. Upstairs.

Q. In one of the rooms?

A. Yeah.

Q. Were you handcuffed or –

A. Yeah.

Q. Do you remember what you were wearing that night, Gary?

A. Ah, a old ragged pair of blue jeans and some Nikes, a T-shirt.

Q. Do you remember what was on the T-shirt?

[652] A. Ah, I believe it was a marijuana leaf.

Q. Did you have any other kind of other coat or something to wear?

A. It was a pullover like sweater sort of.

Q. What color was it?

A. Ah, it's mixed.

Q. Now, the next day I think Investigators –

A. Ron Hamlin and Bobby Fleet came back.

Q. And what did they want that day?

A. Basically to see, to see if, ah, what I said would change, I reckon. I don't remember why they told me they were there.

MR. JENKINS: Your Honor, if he doesn't know why they came back, it's improper for him to speculate on why they came back.

THE COURT: I don't think any harm was done by that question or answer.

MR. JENKINS: Exception to the ruling of the Court, Your Honor.

THE COURT: All right, sir.

Q. Do you remember asking you about any [653] things that may have been in the car?

A. Yeah. They, ah, that's where, that's when I told them where the, where we had threw the clothes and the backpack at and explained where to find them.

Q. Did you ever talk to anyone from Floyd County?

A. Yeah.

Q. Did you tell them what happened over there?

A. Yeah.

Q. Did you get charged in Floyd?

A. Yeah.

Q. And did you get charged in Giles?

A. Yes.

MR. SCHWAB: Your Honor, at this time we'd move for admission of a certified copy of the Plea Agreement of Gary Barker.

MR. TUCK: Your Honor, I would concur with that. We had planned on introducing it as evidence as well.

THE COURT: All right, sir.

[654] MR. SCHWAB: As well as the certified copy of the Order of conviction of this Court.

THE COURT: All right, sir.

MR. SCHWAB: Concerning Mr. Barker's eight (8) charges.

THE COURT: All right, sir. They're accepted without objection.

Q. Gary, you said something about –

THE COURT: Mr. Schwab, just a moment, please, while we –

MR. SCHWAB: Okay. Fine, Your Honor.

THE COURT: Mark the exhibits.

CLERK: Commonwealth Exhibit Number Forty-six (46) is a certified copy of the Plea Agreement. Commonwealth Exhibit Number Forty-seven (47) is a certified copy of the, of the conviction order.

MR. SCHWAB: Thank you.

Q. Gary, you said something about one reason you were going to kill yourself or thinking about it that night because of what you'd seen?

A. Yeah.

[655] Q. And what did you mean by that?

A. Well, I, I seen a guy get shot down for no reason (pausing), none whatsoever.

Q. Had you ever seen anybody shot before?

A. No.

Q. Had you ever talked about shooting somebody?

A. Yeah, I have. I've talked about it, you know. Ah, when push comes to shove though, I mean, I couldn't do it, bŭt I've, me and all my friends have, you know, just drunk and running your mouth, you know.

Q. When you drank, did you like to run your mouth?

A. Yeah.

Q. Did you like to be a tough guy?

A. Somewhat of one, yeah.

Q. And would you often say you could take people out or you wouldn't mind doing stuff?

A. I, I know I've said it probably more than once.

Q. Are you ever going to say it again?

[656] A. No.

Q. Why not?

A. Just sick man.

Q. What's sick?

A. It's, it's, it's nothing like I've ever saw. It's not like, it's not like a deer or anything like that it's (pausing) – I'd like to take a recess, if I can.

MR. SCHWAB: That's all the questions I have for him now, Your Honor, if that would be okay.

THE COURT: All right, sir. Thank you. Ms. Skidmore, if you would take the jury out, please.

WITNESSES RETURNED TO COURTROOM

THE COURT: Ladies and Gentlemen, I have been advised your testimony will not be needed this afternoon and I'm going to release you subject to recall and the same admonishments that I've given you earlier are still in effect and that is you're not to discuss your testimony or any element of this case with anyone else or allow them to discuss it with you and you're not to watch any TV or radio accounts or read any newspaper [657] accounts about this until the case is concluded. Does anyone have any questions? All right, thank you Gentlemen, do they need to return at 9:00 or are they subject to call?

MR. TUCK: Your Honor, I believe most of them would be, I see the Commonwealth has two (2) more witnesses. I don't know of any other, so, I'm looking at this group and saying that all of them can start off from the beginning in the morning, first thing, 9 o'clock. I am assuming that the Commonwealth's evidence will be in fairly soon.

THE COURT: All right. Okay. Let's excuse you then until 9:00 a.m. in the morning and if you'll return to the same room that you have been in today. Thanks very much. Mrs. Skidmore, would you show them out?

THE COURT: All right, let's bring the jury in, please.

THE COURT: Mr. Schwab, am I correct that you have completed your direct examination?

MR. SCHWAB: As best I can remember, [658] Your Honor.

THE COURT: All right, sir. Then, Mr. Tuck, let's proceed with cross.

CROSS-EXAMINATION

BY MR. TUCK:

Q. Mr. Barker, I believe you indicated under direct examination that you had received a plea bargain for fifty-three (53) years. Is that correct?

A. Yes, sir.

Q. All right. Let's talk about that plea bargain for a little bit. Can you tell me if you were to be, what's the maximum penalty for robbery?

A. Ah, I think twenty (20) years. I think, I'm not sure.

Q. Would there be something I could refresh your recollection with? Let me show this to the Commonwealth.

MR. SCHWAB: You should know what the statute is, sir.

A. I, I try not to think about it too much.

Q. I've got the highlighted portion. What [659] does the highlighted portion indicate? Well, read it to yourself, not aloud. Now, does that refresh your recollection as to how much robbery carries?

A. Yeah, somewhat.

Q. All right. How much does it carry?

A. Ah, five (5) to life.

Q. So, we've got (writing on dry erase board). Now, how much, if you recall, does abduction carry?

THE COURT: Excuse me. Mr. Tuck, let's make that accurate then since there is a range.

MR. TUCK: Oh, I'll be more than happy to.

Q. Five (5) to life, is that correct? Is that correct?

A. Yes, sir.

Q. All right. Now, do you recall under the Code Section that you were charged with an abduction, as well as your codefendants, can you tell me how much that carries?

A. Ah, I'm not sure.

[660] MR. TUCK: I've also, I've got the Code Section as well as the class. Mr. Schwab.

MR. SCHWAB: If it's cross-examination, Your Honor, he can just ask him if that's the correct sentence or if he knows.

THE COURT: I'll assume that Mr. Tuck has –

Q. Punishable by a Class Five (5) Felony –

THE COURT: Copied the correct sentence.

Q. Class Five (5) Felony is imprisonment for ten (10) years, is that correct?

A. Yes, sir.

Q. Do you remember under the Code Section which you were charged how much the car jacking would carry?

A. Ah, I'm not sure.

Q. Would that be life as well?

A. Ah, could be.

Q. Can you tell me, now, let's see, I believe, we've got abduction, car jacking and how much [661] were you facing for the murder charge?

A. Ah, –

Q. A principal in the second degree?

A. Life.

Q. Now, were there four (4) other charges? The use of a firearm in the commission of a felony?

A. Yes.

Q. They carry a mandatory sentence, isn't that correct?

A. Ah, I believe it's three (3) years.

Q. Three (3) years. So, three (3) times four (4), that would be twelve (12)?

A. Yes, sir.

Q. All right. Now, that's just the Montgomery County charges, isn't that correct?

A. Yes, sir.

Q. Now, did your plea bargain just include the Montgomery County charges or did it include the Giles County charges?

A. Ah, it included Giles County.

Q. So, on those Giles County charges there is [662] two (2) more robberies, right?

A. Yes, sir.

MR. SCHWAB: Your Honor, Mr. Tuck knows as well that the Plea Agreement in this county speaks for itself. As far as any agreements in any other county, if the record may show that this Commonwealth Attorney's Office did not make any agreement concerning any other jurisdictions, and, to my knowledge, he hasn't come to trial in those other jurisdictions.

THE COURT: All right, sir. Does the Plea Agreement refer to out of Montgomery County case?

MR. TUCK: It does not refer to any out of Montgomery case –

THE COURT: All right, sir. Then I'll sustain the objection.

MR. TUCK: Your Honor, may I ask you a simple question? I believe that Mr. Spangler was here in the Courtroom when this Plea Agreement was arranged. I believe he was contacted by telephone to see if he would run his fifty-three (53) years concurrent and that was the agreement. Now, it may not be in the Plea [663] Agreement, but I believe it goes to the credibility of this witness and I believe it's essential that we bring out the fact that he was facing charges in other counties and that is to run concurrent.

THE COURT: Well, you can bring out that he's facing charges in other counties, that's proper, but if, where you're referring to is not a part of the Montgomery County Plea Agreement, you may not go into that, but

you may ask him if he were facing any other charges that were not encompassed by this agreement.

MR. TUCK: Your Honor, I take exception to your ruling –

THE COURT: All right, sir.

MR. TUCK: And I would, please note my objection based on the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

THE COURT: They're noted.

MR. SCHWAB: Your Honor, could you also –

MR. TUCK: Your Honor, I believe I [664] should strike the last.

MR. SCHWAB: Instruct defense counsel again to add the minimum sentences?

THE COURT: Yeah, –

MR. TUCK: I asked him the question of maximums. I didn't ask him the question of minimums. Back to the first question –

THE COURT: All right. But I think it's only fair if you're using this as an exhibit for the jury. I think it's only fair that you give the range of sentences.

MR. TUCK: I believe the, the principal in the second degree is twenty-five (25) years. I may not be certain. If Mr. Schwab would like to correct that I would be more than happy.

MR. SCHWAB: It's one (1) to ten (10) on the other.

MR. TUCK: I believe this would be a, that would be a –

MR. SCHWAB: Twelve (12), that's correct.

[665] MR. TURK: [sic] And, Your Honor, I am just going to simply scratch through the bottom light.

THE COURT: All right.

Q. Now, you indicated, I'll, how many felonies have you been convicted of?

A. Ah, I don't believe I have.

Q. You don't believe you have?

A. No, I don't –

Q. You remember entering pleas of guilty eight (8) times in Montgomery County?

A. Yeah, on my Plea Agreement, yeah.

Q. So, that was eight (8) felony convictions.

A. Okay, then that's eight (8) then.

Q. Do you, are you only convicted of eight (8) felonies or is there some more felonies out there?

A. Ah, ah, in Floyd County.

Q. Two (2) more felonies?

A. Yes, sir.

Q. Have you ever been convicted of any crimes involving moral turpitude? Those are lying, cheating or stealing?

[666] A. Ah, yes, sir.

Q. And how many?

A. I'm not sure.

Q. Would, I believe the Commonwealth yesterday indicated that they would provide certified copies. I have one and there is one that is maybe in some question. Would this –

THE COURT: Let Mr. Barker review those to refresh his memory.

A. Ah, this hasn't went to Court yet.

Q. Hasn't went to Court yet. You didn't go to Court on 4-25-95? This is a certified copy from the General District Court. You didn't go to Court on 4-25-95 or you just, you just can't remember?

A. I don't remember. I don't believe I did.

Q. Didn't remember –

A. I remember those charges, but I –

Q. Present. Pled not guilty. Found guilty as charged. April 25th, Judge Mullins was on the bench. Don't remember that?

A. Huh-uh.

[667] Q. okay.

A. Ah, as a matter of fact, I just got a continuance on a, on a some charges that Joey Showalter was representing me on and them, those are the ones. As far as I know, you, you got some wrong paper work.

MR. TURK: Your Honor, I would, I believe it's the same paper work that the Commonwealth Attorney had. I'd ask this to be Defendant's Exhibit Number One (1) and let the certified copy speak for themselves.

THE COURT: All right, sir. Any objection?

MR. SCHWAB: No, Your Honor.

CLERK: Defendant's Exhibit Number One (1), certified copies of arrest records.

MR. SCHWAB: Your Honor, getting back to the question, first degree murder would be twenty (20) to life.

MR. TUCK: Your Honor, I'll be more than happy to correct that.

MR. SCHWAB: Car jacking is fifteen (15) [668] to life.

MR. TUCK: I believe that was car jacking.

MR. SCHWAB: All right.

Q. Now, let's go back now. You've got the charges over in Floyd. Those are felonies, correct?

A. Yes, sir.

Q. They also involve crimes involving moral turpitude. Was one (1) of those charges lying, cheating or stealing?

A. Stealing, yes, sir.

Q. So, that's a third (3rd), is that correct?

A. Yes, I guess.

Q. Now, you were just there today, is that correct?

A. Yes, sir.

Q. And you didn't remember those felony convictions that you were just over there today?

A. It was two (2), I don't, it was two (2), I mean.

Q. And what were the two (2) charges? We [669] know one (1) is grand larceny. What was the other?

A. Breaking and entering.

Q. Now, I'm going to ask you to take a minute and ask you, see, reflect back, is there is any other charges, convictions of lying cheating or stealing that you have been convicted of? Take a, take a minute to reflect.

A. Ah, no, other than what we just went over.

Q. But you're still denying that you were convicted of that one up there?

A. I do not remember it.

Q. Now, I believe you said, indicated that you had given, let me take a step back. I guess this is probably pretty important to you, this, this trial from the indication you didn't want your family to, you didn't want to take the blame for it because it would upset your family, is that correct?

A. Ah, I didn't want to take the blame for it because I didn't do it.

Q. Okay. And, so, it would upset your family?

[670] A. Yeah, I'm sure it would have.

Q. So, this trial was pretty important to you?

A. Actually, I'd rather be doing other things than be setting here.

Q. Did you watch television accounts last night about this?

A. Ah, no, I sure didn't.

Q. Did you read any newspapers about these events?

A. Ah, yeah, I caught this morning.

MR. TUCK: Your Honor, at this time I like to motion, to make a motion outside the presence of the jury.

THE COURT: All right. Mrs. Skidmore, if you'd take the jury out, please.

MR. TURK: Your Honor, I believe there was a motion to sequester all witnesses. They were not to read newspaper accounts and that I will be the first one to admit Mr. Barker was not in the Courtroom. However, he has violated that motion, we would ask the [671] Court to strike his testimony and strike him as a witness. He has violated the Court's orders.

THE COURT: All right. Well, he hasn't really violated the Court's order because he hasn't been over here to be admonished. Any response?

MR. SCHWAB: Your Honor, the Code Section provides that the Court can exclude witnesses and there is some language in some cases that they can be separated from each other so as not to learn or hear what the

testimony in Court is. That's clear as the purpose of the ruling. So, one (1), Mr. Barker was never brought before the Court. He was not sworn in until today. Two (2), there in no indication because of what he read in the paper could affect his testimony whatsoever and they haven't shown that. What they're trying to do is a cheap trick to get this thing dismissed and that's exact what it is because they asked the question. He, they know Mr. Barker wasn't here, they knew Mr. Barker wasn't here. There was nothing in that newspaper today to indicate to him anything he could testify about and I see absolutely no reason. He was excluded from the Courtroom. He was [672] separated from the other witnesses and he can be questioned, if they would like, about what he learned from the paper today, but he does not have to have his testimony stricken for that reason.

THE COURT: Mr. Barker, you read today's newspaper?

MR. BARKER: Yes, sir.

THE COURT: Which one?

MR. BARKER: THE ROANOKE TIMES.

THE COURT: All right. Mr. Weaver, I believe there's a copy of that paper in the office, in Mrs. Cole's office. Would you bring that to me, please.

MR. TUCK: Your Honor, while I believe someone is going to get the newspaper, Mr. Jenkins has indicated to me that we both by saying it's a cheap trick –

MR. JENKINS: Your Honor, we object to that. That, there's no call for that.

THE COURT: Well, it was not said before the jury, so –

MR. JENKINS: Said before anybody, Your [673] Honor, I object to that.

THE COURT: Well, –

MR. JENKINS: We're doing the best we can –

THE COURT: Well, I'm beginning to object to both attorneys in their approach to asking questions and responding to questions and I'm not going to have any more of it and this was not done in the presence of the jury, so it has no bearing on your conduct has, or no one's conduct has any bearing on what the jury has witnessed.

THE COURT: (Reading THE ROANOKE TIMES article).

THE COURT: Mr. Barker, has anything that you read in this morning's edition of THE ROANOKE TIMES influenced in any way your testimony before this Court?

MR. BARKER: Ah, no, sir.

THE COURT: All right, sir. I'm going to overrule your motion. I am going to permit you to, if you wish, to attach a copy of the news article with your [674] exceptions, but there is no reason to believe that he has been influenced in any way by what he read.

MR. TUCK: Your Honor, perhaps we could mark that Defendant's Exhibit Number Two (2) and allow that to go on as, as that.

THE COURT: All right, sir. You'll have to produce your own copy, Mr. Tuck.

MR. TUCK: Your Honor, I believe Ms. Garcia is in the Courtroom and I am sure THE ROANOKE TIMES will provide us a copy. Your Honor, I believe, after speaking with counsel, –

THE COURT: Excuse me a minute.

COURT REPORTER: Is it an exhibit?

THE COURT: No, no, I said –

MR. TUCK: No, it's –

THE COURT: I said you may, you may attach it to your objection, I mean to the motion as an attachment to that motion.

MR. TUCK: Oh, as an attachment. That would be fine, Your Honor.

MR. TUCK: Your Honor, also, I have [675] spoken with counsel and we would move for a mistrial at this point in time because we believe that Mr. Barker has read and violated the sequestration order and I understand the Court's prior ruling and I understand what the Court may rule, but if you would simply note our objections.

THE COURT: All right, sir. And I am going to deny the Motion for a mistrial. Number one (1), Mr. Barker has not been before the Court to receive any admonishments, and Number Two (2), after having questioned him in so far as the article in today's paper is concerned, he has stated, under oath, that it in no way would influence his testimony at all and the Court in having read the article does not feel that there is anything in the article that could influence his testimony today.

MR. TUCK: Your Honor, obviously, we disagree with the Court, so we respectfully take note of our objections and based on the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

THE COURT: I understand and they're noted.

[676] MR. TUCK: Thank you, Your Honor. Your Honor, I believe we're about ready for the jury again.

THE COURT: All right, sir. Everyone through with their motions? All right, Mrs. Skidmore.

THE COURT: All right, Mr. Tuck, go ahead and continue.

MR. TUCK: Thank you, Your Honor.

Q. I believe you indicated to the Commonwealth that you had been interviewed approximately four (4) times by the police, is that correct?

A. Ah, yes, sir.

Q. Two (2) with Hamlin, one (1) with Goodman and one (1) with Lieutenant Price, I believe, from over in the Giles County Sheriff's Department?

A. Ah, and one (1) from Floyd.

Q. And one (1) from Floyd. So, there were actually five (5)?

A. Yes, sir.

Q. Now, in any of those, did you indicate that you went to Radford that evening, the night before, [677] December the 4th?

A. I don't recall.

Q. You don't recall. Would looking at them refresh your recollection?

A. Ah, yes.

Q. Okay. I'll he happy to.

Q. This is, just for the record's sake, Lieutenant, Detective Sergeant Goodman, I was getting ready to give him a raise. I believe I'm, we're at Page 3, 2 and 3.

THE COURT: Gentlemen, let me address you while Mr. Barker is refreshing his memory, the Court's objective is to adjourn Court today for 5:30 and anticipating you will not complete your cross, I'm going to leave it up to you, Mr. Tuck, to tell me when it would be a convenient time in the break, in the chain of your cross-examination to adjourn.

MR. TUCK: Your Honor, if I might have a word with co-counsel.

THE COURT: All right.

MR. JENKINS: Whatever you, go ahead, [678] whatever you want to do.

MR. TUCK: Your Honor, I, I would just simply continue on and when we get to 5:30 I'll –

THE COURT: All right, sir, but you know I think it's important that you consider where we break and if there's, if you're at 5:20 and there is a logical stopping point, then we'll do that. In other words, our goal is 5:30 and I'll leave it up to you to advise me of a convenient stopping point.

Q. In reviewing Detective Goodman's statement, did you indicate that you went to Radford?

A. Ah, no, sir, I didn't.

Q. Would you like to review the others to see if you in fact told them?

A. Ah, no, I believe that's all right.

Q. So, you didn't tell them that you went to Radford, is that correct?

A. That's correct.

Q. Now, when you were over at Warren Nolen's home, over in Radford, because you testified you were over there?

[679] A. Yes, sir.

Q. You didn't tell the police that?

A. Well, ah, I guess, ah, he just got out of the penitentiary and you don't just drag people into stuff that really had nothing to do with it.

Q. Okay.

A. Unless it's absolute –

Q. All right. So, you were holding back to the police? You didn't want to tell them everything?

A. Ah, as far as that went, yeah, we stopped by there. He knew nothing about where the gun was stole or anything like that.

Q. You didn't tell them that –

A. I felt it wasn't no reason to put a man in some position that he didn't want to be in.

Q. Well, did you tell him that you committed the robberies over in Floyd County?

A. Ah, I don't recollect that we told him anything.

Q. All right. Did Ben ever possess any of the weapons, firearms, while he was over there?

[680] A. Yes, sir.

Q. He did, and you're certain of that?

A. Positive.

Q. Did you in fact tell Warren Nolen and Patricia Quesenberry that if someone was riding behind you trying to pull you over that you would take a shot at them?

A. Ah, I do not recall that.

Q. So, you're saying you didn't say that?

A. Yes, sir.

THE COURT: I think he said he didn't recall that.

MR. TUCK: And I believe that I, and I asked, are you saying you didn't say that and he responded, yes, sir, I believe.

THE COURT: Let's make sure he understands the questions because they are contradictory answers.

A. Ah, I'm pretty sure I didn't say that.

Q. Pretty sure you didn't say that. All right. Now, I believe, then you went over to Blacksburg, [681] is that correct?

A. Yes, sir.

Q. All right. And you were, you and Mark Lilly were renting a room from A. J. Falls, is that correct?

A. Yes.

Q. Ben wasn't renting a room. He lived over with his Mom over in Riner, is that right?

A. Yes, sir.

Q. Now, I believe you indicated that you started getting drunk with A. J. Falls, is that correct?

A. Ah, we was getting drunk before we got there, but, yeah.

Q. And you continued to got drunk with A. J., is that correct?

A. Yes, sir.

Q. And I believe you indicated that there are times when you start getting drunk you get a little mouthy, is that correct?

A. Ah, yes, sir.

Q. Talk about doing things?

[682] A. Yes, sir.

Q. At that point in time, did you point the gun at A. J. Falls?

A. No, sir.

Q. You didn't threaten him that evening?

A. No, sir.

Q. Now, did Ben have any of the weapons when he was at A. J.'s house?

A. Yes, sir.

Q. He did, and you're certain of that?

A. Yes, sir.

Q. Okay. Now, I believe you also indicated that you went down to some trailer parks after you shot the goose, in that correct?

A. Yes, sir.

Q. And then you stopped at a trailer park across from the rock quarry, I believe that's on Jennelle Road, is that correct?

A. Ah, I'm not sure which road it is, but it's –

Q. Across from the rock quarry?

[683] A. Yeah.

Q. And that's in Montgomery County?

A. Ah, yes, sir.

Q. Is it near the road on Holiday Ford?

A. Yes, sir.

Q. Okay. So, if that was Jennelle Road, then that was the road that you were on?

A. Yes, sir.

Q. Okay. Now, did at some point in time during that evening, when you got to that trailer park, did Mark threaten anybody with that firearm, pull it out and pull the hammer back?

A. No, sir.

Q. All right. And you're certain of that?

A. Yes, sir.

Q. Now, did you indicate to A. J. that the property was stolen that was in his home?

A. Yes, A. J. knowed it.

Q. All right. Did you tell him where you had gotten it from?

A. No, sir.

[684] Q. Now, I believe you've indicated that you were wearing a pullover sweater and a marijuana T-shirt, is that correct?

A. Ah, yes, sir.

Q. And these are the, is this the pullover sweater? Let the record indicate that I pulled this out of Bag Seven (7).

A. Yes, sir, that's mine.

Q. That's it. And this was your T-shirt that you were wearing? I believe it's got –

A. Yes, sir.

Q. American Center on the back? And that was the shirts and that was the clothing that you were wearing on December the 5th, is that correct?

A. Yes, sir.

Q. Okay. Now, did you ever go, I, I don't recall you mentioning the prosecutor, and perhaps I'm wrong, do you recall mentioning or meeting Joyce Lang or Michael Lang that day?

A. No, not that day.

Q. You did not see them the day, December the [685] 5th?

A. No, sir.

Q. You were not driving Ben's car without Ben being present?

A. No, sir.

Q. You did not tell them, obviously, since you didn't see them that day that you would kill your own best friend and never regret it?

A. No, sir.

Q. Now, let's go to about 6 o'clock. You've indicated that you were out at Cowboys, is that correct?

A. Some, well, I don't remember the exact time, but we at Cowboys, yes.

Q. Was it getting dark?

A. Yes, it was getting dark, yes.

Q. And I believe you indicated that Mark Lilly got out in the car with somebody?

A. Ah, me and Ben got out of the car and, ah, a guy got in the car with Mark.

Q. A guy got in the car with Mark?

A. Yes.

[686] Q. Was his name Ron Lucas?

A. I have no idea.

Q. Don't know what his name was?

A. No, I don't even remember what he looks like.

Q. And you came out there later and pulled out a gun, is that correct?

A. Ah, no, that's not correct. Ah, –

Q. But you did pull out the rifle?

A. Yes, but I didn't come, I, I, I had stated that, ah, that, ah, when we got out of the car and the guy got in the car with Mark, I was showing the rifle to somebody, yes.

Q. Well, Ben didn't come around and tell you to put those damn guns away and take the rifle away and put it in the trunk?

A. Definitely not.

Q. Definitely not. Now, the prosecutor asked you, did Bill Williams, did you say anything to Bill Williams, did you do anything with the gun? This is over at the store over in Pembroke, the second robbery, and I [687] believe you indicated that you didn't, is that correct?

A. Yes, Sir.

Q. You didn't tell him that you would blow his head off, did you?

A. No, sir.

Q. Didn't point the gun at his forehead, did you?

A. No, sir. I was waiving it around, but I wasn't –

Q. You never pointed it at him or never told him you would blow his head off?

A. No, sir.

Now, did you ever state to, do you know who Bo Hutchinson is? Clarence Hutchinson?

A. Ah, yeah, I was in jail with Bo a while back, a good while back.

About a year ago?

A. Ah, way over a year, yeah.

Q. Okay. Did you tell him that you would be coming back to prison for murder?

A. No, I sure didn't.

[688] Q. Do you know Bo Hutchinson? How long have you known him?

A. Ah, well, from the time I was in jail, a couple months, I guess.

Q. A couple months. He was your cell mate?

A. Ah, no, he wasn't my cell mate. He was in our cell block.

Q. Now, I'm going to draw your attention to a statement to Gary Price, you've made to Gary Price. And I believe that was the first interview that you gave.

A. Ah, yeah, I believe he was the first one.

Q. Well, first, let's look at Goodman's statement. I believe you indicated and you testified under oath that you and Mark were, and I want to make sure I characterize this properly, you, well, tell us what was going on when the car breaks down, where are you at, where is Ben Lilly at and where is Mark Lilly at?

A. Ah, they are, ah, I'm in the car and, ah, I, I remember, I remember one of them guiding me back. Ah, I'm not sure if it was both, but I, I, though I was the only one in the car. Both of them was guiding me [689] back.

Q. Both of you were guiding him back?

A. Yeah, I'm pretty sure.

Q. Ben wasn't way down the road or anything like that?

A. No.

Q. Do you recall your statement made to Gary Price? I am going to direct the Commonwealth' s attention to Page 18.

MR. SCHWAB: Thank you very much.

Did you indicate, now, I'm, ah, Page 18, I believe, let's, Gary Price says, okay, okay, go ahead. I'm going to ask you to read this to see if it refreshes your recollection.

A. Start right here?

Q. Yeah. Read that and see if that refreshes your recollection as to what you told him?

A. And Mark, me and Mark was –

Q. Now, don't read it aloud. Read it out to yourself.

MR. SCHWAB: Your Honor, defense [690] attorney has already read part of it out loud.

MR. TUCK: I was doing that for instructions –

THE COURT: I'm going let him read it to himself and then ask whatever questions you want.

MR. TUCK: Your Honor, I was simply doing that so the Commonwealth would know where we were at.

Q. Now, did you tell Gary Price that Ben Lilly was still way down the road? Went walking down the road?

A. Ah, that's what it says in there, yeah.

Q. Now, whose decision was it to ditch the guns? Was it yours, or Mark's or Ben's?

A. It was all of our decisions.

Q. All of your decisions?

A. Yeah, we knew we couldn't walk down the road with guns and liquor.

Q. Knew you couldn't walk down the road with guns and liquor.

I draw your attention to, [691] paragraphs. I'm going to ask, see if this refreshes your recollection.

MR. SCHWAB: Your Honor, at this time it appears they're trying to use prior inconsistent statements and if that's the case, then I would like it done the proper way and not as refreshed recollections so those items can come into evidence.

THE COURT: All right. If that's what your intention is, I would sustain that.

MR. TUCK: Your Honor, I'm asking if he recalls making these statements?

A. Ah, yeah, and I was asked about these and I answered the same way it was.

Q. Okay. Now, one of the things that you also said that you said you thought that it was funny that Alexander Defilippis was stripped down to his underwear and socks and was standing out, is that correct?

A. At the time, it was.

Q. Alexander Defilippis had been abducted, his car had been taken, his wallet had been taken, his [692] watch had been taken and his clothes had been taken and that was funny?

A. Ah, I guess drugs make you do some funny things.

Q. So, you were doing drugs that night?

A. Ah, as I stated before, yes.

Q. What kind of drugs?

A. We was smoking some pot.

Q. Now, who is we?

A. Me and Mark.

Q. Is Ben smoking any marijuana?

A. Ah, no, he was just drinking.

Q. All right. Does Ben smoke marijuana?

A. Ah, he hadn't with me.

Q. Okay. So, you've never seen him?

A. No, I haven't.

Q. So, when you were going around to try to sell all these guns to buy weed, I believe you called it, that was for your consumption and Mark's consumption, is that correct?

A. Yes, we had enough alcohol to keep him [693] going.

Q. So, he was drinking the alcohol and y'all were doing the weed, is that right?

A. We was drinking alcohol too, but we had plenty of it.

Q. Now, I believe that you've indicated in prior statements that you were, let's go back to that scene. You leave the scene, you stop some place to buy some beer?

A. Yes.

Q. Where's that at?

A. Ah, I believe the name of the store is Dina's. I'm not positive, but I believe it is.

Q. And Ben Lilly went in, is that right?

A. Yes.

Q. Did he take a gun in with him?

A. No, he didn't.

Q. And he came out with some beer, is that right?

A. Came out with some cigarettes and some beer, yeah, that's right.

[694] Q. Did not rob the store, is that correct?

A. No, he didn't rob that store.

Q. Before we leave that scene, let's talk about something else. You indicated that you covered your face or, or told Alexander Defilippis at the crime scene to close his eyes because you didn't want the dome light to see him, is that correct? The dome lights, so he couldn't see –

A. Yeah. Yeah.

Q. Your faces? That was a concern of yours?

A. Yes, at the time, the only person he saw was, ah, Ben.

Q. And was it also a concern over yours over in Eggleston?

in the first robbery? Did you tell Howard Barnett, don't look at my face?

A. Ah, no, I didn't.

Q. You didn't tell him that?

A. Not that I recall of.

Q. Now, this is a picture of the Heathwood Express and this is where the car is. I am showing him Exhibit, I

believe it's Number Two (2). Is that where [695] the car ended up?

A. Yes.

Q. Is this a light, street light?

A. Yes.

Q. Is this a street light?

A. Ah, it appears to be.

Q. These are all lit up?

A. Yes.

Q. Alexander Defilippis saw your face when you were at the store, didn't he?

A. Ah, no, he didn't.

Q. He didn't see your face?

A. No, he didn't.

Q. He was standing outside the car, is that correct?

A. Yes.

Q. And you and Mark Lilly walked up towards the car, isn't that correct?

A. And got in the car, yeah.

Q. And –

A. We ran up to the car and got in the car.

[696] Q. And it's lit, isn't it?

A. Yes.

Q. And he saw your face, didn't he?

A. I don't believe he did.

Q. You don't believe he did?

A. No, I don't.

Q. Are you certain?

A. Well, I, nobody can be certain of what he seen or what he didn't see.

Q. Were you certain that night? Was it a big concern of yours? Were you certain that night?

A. Ah, yeah, I was pretty certain he hadn't see my face, yes, sir. At the time, I was I still don't think he did.

Q. Did you indicate to any of the other when you give, gave any of the other interviews, did you indicate that you looked away when Alexander Defilippis got into that car?

A. Ah, yeah, me and Mark ran up and got in the car and we made sure he didn't see our face.

Q. In any of the statements that you made, [697] did you indicate to Alexander Defilippis or that you had had him cover his face when he got into the car at the Heathwood Express?

A. Ah, ah, I'm not for sure, I should have. I probably did.

Q. You should have?

A. I mean, you know.

Q. You should have. Now, you stated that all three (3) of you had gloves, is that correct?

A. Yes, sir.

Q. So, Ben should have had his gloves with him with [sic] the police found him, is that correct?

A. Ah, he should have, yes.

Q. And you had your gloves?

A. Yes.

Q. Mark Lilly had his?

A. I don't know. I wasn't with Mark when he got –

Q. All right. But you had yours and you're certain that Ben had his?

A. I had, I had mine. I didn't say I was [698] certain Ben had his, did I?

Q. No.

A. I said he should have.

Q. He should have?

A. Yes.

Q. Okay.

A. Just, you know, slow down when you talk to me and ask me questions and I'll answer them for you.

Q. I'll be more than happy to slow down. Now, we're going back down to McCoy to that grocery store. Ben's in the grocery store, you're horrified by what, why you, according to your testimony of what you had just saw him do, why don't you leave him?

A. Ah, well, ah, basically, when something like that happens and you seen it no matter what anybody says,

you're an accessory and I wasn't ready to go to jail at that time.

Q. Not ready to go to jail. You'd leave him behind. You'd go to the police –

A. Ah, –

Q. And you'd tell them what you saw him do.

[699] A. It don't work that way. Ah, I haven't heard any cases of it working that way. Ah, I didn't pull the trigger, but I was there. Ah, they didn't tell me if I had, if I had of turned him at the time, I'd been free. I'd still been an accessory from the way I see the laws.

Q. So, the way you see the laws, you figured you're not going to leave Ben behind?

A. Well, it's, it's, it's really no use at the time. Ah, we're all in it more than we could handle.

Q. You didn't indicate to any of the police officers that you were afraid of Ben?

A. Ah, I couldn't believe he did that, but, no, I wasn't really, I can honestly say I wasn't afraid of him.

Q. Weren't afraid of him. And you're certain of that?

Now, let's talk about that Eggleston store. I believe you, you indicated that, did you point the gun at Howard Barnett or did you come in like this and, and say give me all your money? Were you calm, were you yelling, were [700] you shaking, excited?

A. That's the first store, isn't it?

Q. The first store, Eggleston.

A. Yeah, ah, well, I was yelling. Ah, I was excited. It was –

Q. Were you pointing the gun at him?

A. I, I do not remember. Ah, I may have.

Q. You may have. You don't remember pointing the gun at him?

A. No, no, not directly at him, no. I remember –

Q. Do you remember –

A. Holding it out. I knew they seen me.

Q. You knew they seen you. You were holding it out because you were robbing the store?

A. Yeah. Well, I, I had him lay on the –

Q. You had him, had him lay on the floor?

A. I had him lay on the floor and, ah, ah, you know, I couldn't see him no more and he couldn't see me either, so, you know, –

Q. But you, you didn't tell him not to look [701] at his face?

A. No, well, he couldn't see me anyway. He was on the floor and there was a counter in between us. Ah, –

Q. Okay. Now, you indicated, I believe, that Mark Lilly came up and cleaned out the cash register, is that right?

A. Yes, sir.

Q. What was Ben Lilly doing?

A. He was back there where the lady was at –

Q. Uh-huh.

A. By the coolers and he was getting beer and, ah, ah, basically I wasn't paying much attention to what he was doing. Ah, he was back there getting beer though.

Q. Did he throw a knife at you?

A. No, he didn't throw a knife at me. Ah, –

Q. Are you certain of that?

A. No, he didn't throw one at me.

Q. All right. Now, you get into the car. Now, your, you're heading over towards Pembroke, is [702] that right?

A. Ah, yeah.

Q. Bill Williams' store? You knew Bill Williams. You know Bill Williams?

A. Ah, I didn't at the time. I do now.

Q. Okay. So, you were going over to Bill Williams' store and Ben Lilly doesn't go in again. Now, let's go back to make sure I, I understand your correctly. You had the murder weapon in your hand at the Eggleston Store, is that right?

A. Yes, sir.

Q. And then you go over to Pembroke and Ben doesn't go in the store at all, does he?

A. Not in the, not the one in Pembroke. No, he didn't.

Q. And you go in and you don't tell Bill Williams that you're going to blow his head off? You don't mention that? You never say that?

A. No, I know I didn't say that.

Q. Okay.

A. I mean there's a few things, you know, [703] that might be a little cloudy, but I know I didn't. I never threatened nobody's life.

Q. I never threatened anybody's life. And you remember Mona Hylton is the clerk?

A. Yeah.

Q. You told her to give you the money?

A. Yes.

Q. And you ran out and got in the car?

A. Ah, no, Bill come up and grabbed me and, ah, and, ah, I got away from him somehow and then I went to the car, ran to the car.

Q. So, there was a struggle? That was a struggle.

A. Some little one, yeah.

Q. And after the struggle, you weren't upset, you weren't angry?

A. Ah, no, it, actually it scared me more than anything I, because I didn't even see him come in.

Q. Okay. And so you, you, then after that you run out and get into the car, right?

A. Yes.

[704] Q. And you're heading down the road and Bill Williams is following you?

A. Yes, sir.

Q. How close was he?

A. Ah, probably two (2) car lengths.

Q. All right. Two (2) car lengths away?

A. Yes.

Q. And you're proceeding down in, what, what are you armed with at that point in time?

A. Ah, –

Q. You had the gun. How did, where's, where's the gun go from there?

A. The gun it was, oh, back into the front seat.

Q. Who's got it?

A. It's just laying in the front seat.

Q. So, you tossed it forward, you're in the back seat?

A. Yeah.

Q. You just threw it up front?

A. Yeah, and, ah, ah, I carried the rifle out [705] of the floorboard, the .35 caliber and I pointed it out the window, up into the air, and I shot.

Q. Didn't, didn't shoot at them while you were going at a high rate of speed?

A. Nah, it, it's, it, like I said, he was two (2) car lengths behind. if I had of pointed it he, he'd knowed it, I mean, you know.

Q. He'd knowed it if he pointed it?

A. Yeah, –

Q. He knew, he would have known if you'd shot it up in the air, is that right?

A. Yeah, that's right. He, you know, that's what made him stop, slow down, you know.

Q. Made him, well, that's what, okay. Then you, you come to a complete stop? Eventually the car breaks down, as you said?

A. Yeah, it stops.

Q. And you come to a stop And are you eating anything at that point in time? Or you drinking anything or what are you trying to do?

A. Ah, trying to drink a beer and get stuff [706] out of the car and just grabbing stuff and throwing it over the hill, things, you know, –

Q. All right.

A. Scattering everything.

Q. All right. Now, Officer Tilley's lights that, I believe, that you indicated you knew which officer it was. He, he, his –

A. No, I, I didn't know it was Tilley, –

Q. Didn't know at the time, but now you do?

A. Yeah, now I do, so –

Q. You've reviewed his statements?

A. Yeah. Now, I know it was Tilley, but I didn't at the time.

Q. All right. And you run, is that right?

A. Yeah, me and Mark both ran and, ah, and, ah, I actually thought Ben was behind us, but he wasn't. They, ah, Tilley had done got up on him, you know.

Q. Ben didn't run, did he?

A. Ah, he tried to, but I, I mean, you know, I'm sure he was scuffling – and –

Q. Was he the first one out of the car?

[707] A. He got out of the car and he come around to the passenger's side and was helping us get stuff out.

Q. He didn't come out of the passenger's side seat?

A. No, he didn't. He was helping get stuff out of the car, but, no, he was in the driver's seat.

Q. He was driving?

A. He was the last one to drive the car.

Q. Okay. But he, he didn't run away?

A. Ah, –

Q. You and Mark ran away?

A. Yeah.

Q. Now, I believe you indicated that you fell down on your knees, skinned them up?

A. I fell down. I don't, I don't recall saying I skinned my knees up, but I fell down.

Q. You fell down. And you went over and you, you were running, is that right?

A. Yeah.

Q. Then you went down and you sat on a rock –

A. Yeah.

[708] Q. With the gun in, in your mouth?

A. Yeah.

Q. And they heard you talking to your, about your Mom or to –

A. Ah, somebody came by. One of the cops that was walking through and I said, you know, something like – Tell my Mom I'm sorry or something like that, you know, and or I love her, or something like that, and then about, I don't know, twenty (20) or thirty (30) of them pointed guns at me and told me to put that one down and kind of woke me up a little.

Q. And you threw the gun away?

A. Yeah, I threw it behind me.

Q. After the put the twenty (20) or thirty (30) guns on you?

A. Yeah.

Q. Okay.

A. I didn't have a standoff with them.

Q. Well, you had a rifle with a scope on it, is that right?

A. But it was in my mouth. It never was [709] pointed in their direction.

Q. Right.

A. Never. Even when I threw it I made sure it wasn't pointed that way.

Q. The gun wasn't pointed that way. I believe you indicated you in your reports that Ben Lilly went right up into Alexander Defilippis' face, is that right, and shot him –

A. Yeah.

Q. At point blank range?

A. Yeah. Right, right at him, yes. From me to you. Ever bit of it.

Q. All right. If not closer, is that right?

A. Yeah, I guess, a little, a arm, a little over a arm length –

Q. All right.

A. And then the gun length, you know.

Q. Now, was this real close to the car?

A. Ah, it wasn't real far, but it wasn't real close. I, like I said, it was, it was, it was close, but, you know.

[710] Q. And you had the fog lights on, is that right?

A. Yeah. Well, the parking lights, whatever, yeah.

Q. Parking, parking lights?

A. Whatever, yeah.

Q. And you were able to see Ben Lilly at a distance, is that correct?

A. Yeah, it gets dark, but it, ah, ah, there is still a moon out.

Q. So, on, there was a moon out?

A. Yeah.

Q. And then, then you've got the fog lights?

A. Well, they wasn't, they wasn't much help, I don't reckon, but I, yeah, I seen –

Q. And you were able to see this at some distance what was going, what was transpiring?

A. Yes, sir.

Q. I believe you even indicated that Alexander Defilippis put his hand up?

A. Yeah, he threw his arm up (describing).

[711] Q. Mr. Barker, you were able to see that far. Wasn't Alexander Defilippis able to see your face?

A. Ah, I, like I said, he wasn't looking at my face. He was just wanting to go. That's all he was

Q. He never looked at your face?

A. No, he never did. Not that I recall.

MR. TUCK: Your Honor, if I might have a minute.

THE COURT: All right, sir.

THE COURT: And, Mr. Tuck, while y'all are discussing a matter, it's 5:30. Assuming, or let me ask you this, do you have a much more extensive cross?

MR. TUCK: I, I don't know. I know my cocounsel has been making a considerable amount of notes over here, so I'm assuming that there's going to be some –

THE COURT: All right, sir.

MR. JENKINS: Yes, sir, there will be some, just one or two more questions, Judge, and we could call it quits. I think, for today.

THE COURT: But, but you're not through [712] with your cross-examination?

MR. JENKINS: No, sir. Mr. –

MR. TUCK: Your Honor, so if you wanted to break –

THE COURT: All right. So, let's look at a point, let's look at a point that we can break.

MR. TUCK: If, if you, if the Court wanted to break now that would be –

THE COURT: You're satisfied with that?

MR. TUCK: Yes, Your Honor.

THE COURT: Mr. Schwab?

MR. SCHWAB: That's fine, Your Honor.

THE COURT: All right, sir. Mr. Barker, were going to conclude your testimony for today. I want you to

remain in the witness box and I will admonish you now, as this is your first appearance before the Court, you are not to discuss your testimony or any aspect of this case with any other person whatsoever and from this point on, you're not to read any news account of these proceedings, nor or you to hear or watch any TV proceedings. Do you fully understand that?

[713] MR. BARKER: Yes, sir.

THE COURT: All right, sir. Thank you. If you would take the jury out, but first as they stand let me ask them the usual question. I don't mean to imply that you all can't understand the simple instructions of the Court, but for the record I want to remind you before you leave the same sanctions that have been imposed previous are still outstanding. Do y'all understand that?

JURORS: Answer – Yes, sir.

THE COURT: All right. Thank you very much and you're excused until 9:00 a.m. in the morning, actually 8:45.

THE COURT: I would ordinarily excuse Mr. Barker at this time. Is that an appropriate time for you all? I'm going to give, I'm going to give the jury a chance to get on the elevator.

MR. TUCK: Your Honor, I believe, I don't know if Mr. Schwab has been able to find it, I know he has had other things on his mind, but I believe there was a discovery list that he had, was going through a [714] check list. I don't know if he's got that now, but I was thinking we could use this time while we have the Court and the record just to go ahead and get that in.

MR. SCHWAB: I do, Your Honor, I have some other things to add to the list.

MR. TUCK: Your Honor, I have no problems with that.

THE COURT: All right.

MR. TUCK: I haven't seen the other items, but –

THE COURT: Well, why don't you all confer once we're recessed and if there are any issues there, we'll take them up in the morning.

THE COURT: Mr. Levesque, once the jury is on the elevators, would you indicate that, please. Thank you. All right, thank you. Mr. Weaver, recess Court until 9:00 a.m. in the morning.

BAILIFF WEAVER: Everyone rise. Court is adjourned until 9:00 a.m. tomorrow morning.

[715] OCTOBER 23, 1996

[716] THE COURT: I believe there are some matters the attorneys wish to address to the record. Mr. Tuck.

MR. TUCK: Your Honor, for the record the portion we have objected to the Court's ruling as far as allowing us to get into the Plea Agreement that may have been taking place in Giles County and Floyd County, I would like to put a proffer before the Court and question Mr. Barker as to those Plea Agreements.

THE COURT: All right, sir. Mr. Schwab, anything you wish to add?

MR. SCHWAB: Your Honor, as long as it's clear that that was a Plea Agreement that was not negotiated, nor does Montgomery County's indicate that that sentence is to be concurrent.

THE COURT: All right, sir.

MR. TUCK: Just as a, I'm just curious as to whether it was a fact.

THE COURT: As, as I recall, there is no mention of any other jurisdiction in Mr – Barker's Plea Agreement in, in this court –

[717] MR. TUCK: That would be correct.

THE COURT: And it was on that basis that I made my ruling yesterday to your motion and I'm very hesitant to go outside, but I am going to let you ask the question as to whether or not any agreements reached outside Montgomery County influenced his decision in signing this agreement, but I don't think we'll be able to go much further than that.

MR. TUCK: All right.

THE COURT: Because we are dealing with a Montgomery County Plea Agreement.

Q. Mr. Barker, I'm going to ask you just a couple of brief questions. You've already heard from the Court this morning.

MR. TUCK: No, we don't need the jury. Not for this.

MR. JENKINS: No, this is a proffer, Ben, of what we call evidence, okay? It's a –

THE COURT: No, this is really just grounds for your motion.

Q. You've indicated that there, you had [718] accepted this plea for fifty-three (53) years, is that correct?

A. Yes, sir.

Q. Was a fact for you accepting this Plea Agreement for fifty-three (53) years the fact that Giles County's charge would run concurrent with the fifty-three (53) years as well? Was that a factor in accepting this Plea Agreement?

A. Ah, it had somewhat to do with it, yes.

Q. Was it a factor that the Floyd County charges would run concurrent with this Plea Agreement, was that a factor?

A. No, sir.

Q. But the Giles County charges were a factor to you?

A. Yes.

THE COURT: All right. I'll allow you to ask that –

MR. TUCK: Regarding the Giles?

THE COURT: Uh-huh, but not the Floyd. Just the Giles and whether or not it did have an affect, [719] and, if so, what affect it did have and then I'll allow you, Mr. Schwab, also to question Mr. Barker in that regard.

MR. SCHWAB: Thank you, Your Honor.

THE COURT: Anything further, Mr. Tuck?

MR. TUCK: Nothing further, Your Honor. Thank you, very much.

THE COURT: All right, sir. Thank you.

MR. SCHWAB: Your Honor, as far as that goes, I can do that on redirect.

THE COURT: All right, sir. All right, Mrs. Skidmore, if you'll bring the jury in, please.

THE COURT: Mr. Clerk, if you'll take the jury's attendance, please.

CLERK: As I call your names, please, answer that you are here. Tammy Bukowski: Here. Michael Eyer: Here. David Jones: Here. Ray Lester: Here. Jennifer Loveday: Here. Linda Martin: Here. Lowell McGuyer: Here. Ervin Price: Here. Dianne Proffit: Here. Jennifer White: Here. James Boyd: Here. Tambra Dixon: Here. Lisa Duncan: Here. Charlie [720] Hall: Here.

THE COURT: Good morning, Ladies and Gentlemen of the jury. All right, Mr. Tuck, if you will conclude your cross-examination now of Mr. Barker.

MR. TUCK: Thank you, Your Honor.

CONTINUATION OF CROSS-EXAMINATION

BY MR. TUCK:

Q. Mr. Barker, I believe you indicated yesterday that you also faced charges in Giles County, is that correct?

A. Yes, sir.

Q. And was the fact that you were facing Giles County charges, was that a factor in whether you accepted this Plea Agreement or not?

A. Ah, somewhat.

Q. All right. And you were facing, what were the charges that you were facing in Giles County?

A. Ah, two (2) armed robberies.

Q. And two (2) armed robberies. Were there any other charges?

A. Ah, gun charges.

[721] Q. Two (2) gun, two (2) more gun charges?

A. Yes, sir.

Q. Now, I'm a little bit slow on math. Maybe you can help me here. The five (5) to life, that would be six (6) years, is that right? Five (5) plus one (1) is six (6)?

A. Yeah.

Q. Plus fifteen (15), that would be twenty-one (21)?

A. Yes, sir.

Q. That would be forty-one (41). That would be fifty-three (53), in that correct?

A. Yes, sir.

Q. And then on the other side, that would be three (3) life terms and twenty-two (22) years, is that correct?

A. Yes, sir.

Q. Now, going back to the Price's Fork area, did you and Mark Lilly kick Ben Lilly out of the car because he was so drunk?

A. Ah, no, sir.

[722] Q. Did you later pick him back up with Alexander Defilippis' car with Alexander Defilippis in it?

A. No, sir.

Q. Did, down that Whitethorne land was there any struggle that took place between Alexander Defilippis, yourself and Mark Lilly?

A. No, sir.

Q. Was Ben Lilly passed out drunk in the car?

A. No, sir.

Q. I believe you indicated you went to Billy Roop's –

A. Yes, sir.

Q. Trailer Court and that was to purchase marijuana?

A. Yes, sir.

Q. And you were going to use the guns to trade it for marijuana, is that correct?

A. Yes, sir.

Q. And that was for your needs –

A. Yes, sir.

[723] Q. And Mark's needs?

A Yes, sir.

Q. I believe you said you also went to Cowboys, is that correct?

A. Yes, sir.

Q. And was that to also get dope?

A. Yes, sir.

Q. Was there any place else that you went that day to get dope?

A. Ah, in the same trailer park.

Q. All right. Did, you indicated, were you able to obtain any marijuana that day? I believe you indicated you smoked it. Were you smoking it throughout the evening or just that afternoon?

A. Ah, throughout the evening.

Q. Had Warren Nolen given Ben Lilly Two Hundred ($200.00) Dollars when you were over in Radford for some work that he had done?

A. No, sir.

Q. Now, I believe you indicated you and, or you at least had food stamps from the first robbery, is [724] that correct?

A. Ah, there was some involved, yes.

Q. Okay. Did you take some of those?

A. Ah, I do not remember.

Q. Okay. Do you know whether Ben Lilly took some of those?

A. I do not remember.

Q. Now, what was taken from the second store in Pembroke?

A. Ah, just money. Ah, a bag of change.

Q. A bag of change. Rolled quarters?

A. Ah, it was rolled, –

Q. Nickels?

A. Yeah.

Q. Pennies, nickels, dimes, quarters, standard change?

A. Yes, Sir.

Q. And did you take that with you when you ran out of the car or did you give that to Ben Lilly?

A. Ah, I don't remember what happened to it. I don't remember who grabbed it.

[725] Q. All right. Do you remember who grabbed the gun out of the car? Did Ben Lilly take the gun out of the, the car when you were stopped by Randy Tilley?

A. There was, ah, three (3) guns involved. Which gun are you talking about?

Q. The murder weapon?

A. Ah, I didn't have it.

Q. Okay. You did not have it?

A. Not at that time, no.

Q. You just took the rifle, is that correct?

A. Yes, sir.

Q. Did you see Ben Lilly take it?

A. No, sir, I didn't.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: All right, sir.

Q. Now, I believe you indicated that you could see Alexander Defilippis because it was a moon lit night, is that correct?

A. Yes, sir.

Q. And you saw his actions and you saw Ben [726] Lilly's actions that night, is that correct?

A. Yes, Sir.

Q. And you could see those clearly?

A. Clear as I needed to, yes, sir.

Q. All right. Did Alexander Defilippis attempt to run away?

A. Ah, no, sir, he didn't. He didn't have a chance.

Q. All right. And so he just was shot and dropped straight to the ground?

A. Ah, no, Sir, he threw up his arm (describing).

Q. Threw up his arm first?

A. Yes, Sir.

Q. And you saw that clearly?

A. Yes, sir.

Q. I believe you've indicated on every single occasion on cross-examination that he never saw your face that night?

A. Not to my knowledge. I don't believe he did, no.

[727] Q. And how far away did you see these events occur?

A. Ah, like I said yesterday, it –

Q. Fifteen (15), twenty (20) feet, thirty (30) feet?

A. It was a little bit further than that maybe. Forty-five (45), fifty (50) feet maybe.

Q. Forty-five (45) or fifty (50) –

A. Somewhere around there. I'm not sure, yeah. I was close enough to see it though.

MR. TUCK: No further questions from this witness.

THE COURT: All right, thank you, Mr. Tuck. Mr. Schwab, any redirect?

MR. SCHWAB: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. Now, Gary, during the cross-examination they showed you a conviction paper which you said you weren't sure?

A. Yes, Sir.

[728] Q. Is Mr. Showalter still representing you?

A. Yes, sir.

Q. And you still have pending criminal charges in Montgomery County?

A. Yes, sir.

Q. Are you telling the jury that you've never stolen anything?

A. No, sir, I'm not saying that, no.

Q. In fact, you told the police that night you'd stole a lot of things, hadn't you?

A. Yeah, basically.

Q. Now, you still have your charges pending in Giles?

A. Ah, yes, sir.

Q. Did Montgomery County agree to make Giles County concurrent?

A. Ah, no, sir, that was between my lawyer and, ah, Giles County.

Q. And you still have charges pending in Montgomery County you haven't been to Court on?

A. Yes, Sir.

[729] Q. Now, he asked you if you put in, told any of the officers you'd been to Radford?

A. Yes, sir.

Q. Did you commit any crimes in Radford?

A. No, sir. None other, none other than getting high.

Q. And do you recall telling, whether or not you told Deputy Price anything about getting out of the vehicle at Whitethorne? About how you did it and why you did it that way?

A. Ah, yes, sir.

Q. And what did you tell him?

A. Ah, I told him that, ah, we had, ah, that boy closed his eyes, ah, because a overhead light comes on in the car, and, ah, we got out, then, ah, he got out.

Q. And did you tell Detective Goodman that?

A. Yes, sir.

Q. And did you tell investigators Hamlin and Fleet?

A. Yes, sir.

Q. But you may not have told them that you'd [730] put your head down when you got in the car?

A. Ah, no, sir, I might not have. I'm not sure.

Q. Now, in Eggleston did you tell the, Mr. Barnett, what did you tell him to do after you came in with, and showed the gun?

A. I told him to, ah, get on the floor.

Q. And did he do that?

A. Yes, he did.

Q. Now, in Pembroke at Mr. Williams store –

A. Yes, sir.

Q. You and Mark went in?

A. Yes, sir.

Q. And where was Ben?

A. In the car.

Q. Did you see where he was in the car?

A. He was in the driver's seat waiting for us.

Q. And you were in the store a little bit longer than you thought, is that right?

A. Yes, sir.

[731] Q. And Mr. Williams came in?

A. Yes, sir, rushed me from behind.

Q. And Ms. Hylton told you she didn't have any money?

A. Yes, sir.

Q. And when you came back out, was Ben Lilly still in the driver's seat of the car?

A. Yes, sir.

Q. Was the car running?

A. Yes, sir.

Q. Now, Mr. Tuck asked if you all kicked Ben out and didn't pick him up until after you had Mr. Defilippis?

A. Ah, he had been with us the full time. Through it all.

Q. And he wasn't passed out either?

A. No, no. Not at all.

Q. And you bought beer how long after you left where you, Mr. Defilippis was killed?

A. It's not even five (5) minutes up the road really as fast as we was moving.

[732] Q. Was there anything else that was lighting up the area that night when Alexander Defilippis was shot?

A. Ah, it wasn't pitch dark, I do not remember. It was, it had enough light to see.

Q. Did you tell the jury whether or not you heard the shots?

A. Yes, I told them I, I didn't hear the shots. I just seen the flashes.

Q. What kind of flashes?

A. Just quick flashes like, I don't know, like a camera flashing sort of.

Q. Did it light up anything?

A. Ah, just a flash. I don't really know how to explain it.

Q. Could you see better at the flashes than you could before?

A. Umm, not really.

Q. And after he threw his hands up, what happened to him?

A. Ah, he stumbled back and Ben shot him [733] again.

Q. You'd been with Ben every since the day before, right?

A. Ah, yes.

Q. And you went to Mr. Nolen's that night?

A. Ah, the night that we had robbed the house in Floyd, yes, sir.

Q. Okay. You didn't see Ben spend any money after he'd been to Mr. Nolen's, did you?

A. Ah, ah, no, sir, we was all broke. That's why we robbed the stores.

Q. You didn't have any money for gas down in Shawsville?

A. Ah, no, sir.

Q. Ben didn't offer to pay for it?

A. Huh, he didn't have any money that I seen or heard of.

Q. Did Ben buy anything at Cowboys?

A. Ah, no, he sure didn't. None of us went in.

Q. Ben give you any money?

[734] A. Huh, no, sir.

Q. Did you see Mark give him any money?

A. Huh, no, sir. Only when we split the money up after the robberies.

Q. Thank you.

THE COURT: Thank you, Mr. Schwab. Any questions on recross, Your Honor.

MR. TUCK: No, Your Honor.

THE COURT: All right.

MR. TUCK: We would subject to recall though, Your Honor.

THE COURT: All right. Thank you.

MR. SCHWAB: Your Honor, could we have a short recess to see if one of my witnesses has gotten here?

THE COURT: Yes, sir. And, Mrs. Skidmore, if you'd take the jury back to the room, please.

THE COURT: Please take Mr. Barker from the stand and, Mr. Tuck, since the examination of Mr. Barker is completed, if you would put your exhibit down, [735] please.

MR. TUCK: Yes, I will, Your Honor.

THE COURT: All right, thank you.

MR. JENKINS: Are we in recess now, Judge?

THE COURT: Yeah.

THE COURT: All right, Mr. Schwab, call your next witness, please.

MR. SCHWAB: Danny Sanders.

LT. SKIDMORE: Do you want him sworn again, Judge?

THE COURT: Yes, uh-huh.

CLERK: Do you swear the evidence and testimony you give in this matter to be truth, the whole truth and nothing but the truth, so help you God?

DANNY SANDERS: I do.

THE COURT: Thank you, Mr. Sanders, and if you'll have a seat there and please once again answer the attorneys questions.

DANNY SANDERS RECALLED

DIRECT EXAMINATION

* * *

Testimony of Mark Wilburn/Direct

[747] Q. Did there come a time when one of the persons arrested used the loud speaker?

A. Yes, there was.

Q. Was that after you came back?

A. Yes, it was.

Q. And which one of the persons arrested used it?

A. Ah, Ben Lilly.

Q. The gentleman in the middle over to your right?

A. Yes, it is.

Q. And he was allowed to use it?

A. Yes, he, he asked if he could use it to talk his brother

Q. All right.

A. Out of the woods.

Q. So, there had only been two (2) arrests at that point?

A. Yes, there was.

Q. And where were you while he was using it?

A. I was just behind the car where he was at.

[748] Q. All right. Did you hear what he said?

A. Yes, I did.

Q. Would you tell the jury what he said over the loud speaker?

A. He kept calling his brother by name and said, Mark, you know, come on out, you know, don't let them kill you. You're not the one that's really in trouble here. You're not the one that's, or the one that's really done anything wrong.

Q. All right. And that was said by Ben Lilly over the loud speaker?

A. Yes, it was.

Q. Now, Mark wasn't located in that area, was he?

A. No, he was not.

Q. Thank you. Answer any questions defense counsel may have.

THE COURT: Mr. Jenkins.

CROSS-EXAMINATION

BY MR. JENKINS:

Q. Ah, Officer Wilburn, now, do I understand

* * *

Testimony of Bill Whitsett/Direct

[754] A. Yes.

Q. Were you working in the evening?

A. Yes. Well, I was not working, I was called out.

Q. And about what time were you called out?

A. Around, sometime after 7:00 p.m.

Q. All right. And why were you called out?

A. It had to do with some armed robberies that occurred in the county.

Q. Now, did you put on your uniform?

A. No.

Q. You went to the scene?

A. Yes, I went to the scene.

Q. Okay. And when you got there, what was going on?

A. Ah, when I arrived there was a, one of our units, Unit 106 was driven by Officer Tilley and he had a subject in custody at the rear of his police car.

Q. In the back seat?

A. Yes.

Q. All right. And there were other officers [755] present?

A. Yes.

Q. And what were the other officers doing at that point?

A. Ah, at that time they were looking for suspects.

Q. Were you present when a second suspect was located there at the scene?

A. Ah, he was located, but out of my sight.

Q. Okay. So, that happened while you were there?

A. Yes.

Q. And did you remain there for how much longer after that?

A. Oh, about a hour, hour and a half or so.

Q. And what function were you performing as a law enforcement officer while you were there that time?

A. I was pretty much standing guard for Mr. Ben Lilly.

Q. Is that the person that was in Mr., your officer Tilley's vehicle?

[756] A. Yes.

Q. And where and how were you standing guard?

A. I was standing outside of the vehicle, ah, adjacent to the back door of the car.

Q. On the side he was on?

A. Yes.

Q. Were any of the windows up or down on the vehicle?

A. The window was down five or six inches or so.

Q. Was Mr. Lilly restrained in any way at that time? Handcuffs, leg irons?

A. No leg irons. I don't recall, I think there were handcuffs. There were handcuffs, yes.

Q. And while you were standing guard, did Mr. Lilly ask you anything?

A. Yes, he did.

Q. Where in the sequence of events would that have been? After you got there after the second suspect was found –

A. It, it was after the second suspect was [757] found, yes.

Q. All right.

A. He called me over to the car.

Q. And how did he do that?

A. He, ah, asked me to come over to the car that he had a special request for me. He asked me if I would do

him a special favor. He asked me if I wanted to put the barrel of my gun, shotgun, ah, in his mouth and pull the trigger.

Q. You were holding your shotgun at that time?

A. Yes.

Q. And what did you say?

A. I said that, ah, I couldn't do that. He knew that I couldn't do that and I asked him to, ah, asked him if I looked like a murderer.

Q. And then what did he do?

A. He, he said something at that time and he sat back in the car and –

Q. Did you hear what he said?

A. Ah, not precisely, no.

[758] Q. All right. And then what did you do?

A. Well, he, he said something to prompt me to ask and I said what does a murderer look like anyway. I don't recall exactly what he said, but it, that lead to that question.

Q. And did he make a response to that?

A. And he said that, ah, he set back in the car again and he said, me.

Q. Did he say it loudly?

A. He, he said it loudly enough to where I could understand what he, it sounded like he said me to me.

Q. All right. And after you heard that, what did you do?

A. I said that, ah, I asked him what did he say? And he said that, ah, he was going to hell to meet his brother.

Q. Did he tell you why he thought his brother may be in hell?

A. Ah, he said that his brother committed suicide some eight years earlier. It was that, a matter [759] of fact on the 12th of December, and that, ah, he was probably going to meet his brother in hell.

Q. And when you went out that night, did you know, what crimes were you aware of?

A. At that point in time, the only crimes that we were aware of that they were suspected suspects in an armed robbery that occurred in Giles County.

Q. You didn't know anyone had been killed at that point?

A. No.

Q. Did you know anybody had been shot at that point?

A. No.

Q. And the person that asked you for this special favor, is he in the Courtroom?

A. Yes, he is.

Q. Would you point him out, please?

A. That's Mr. Lilly right there.

Q. The one in the middle?

A. Yes.

Q. Thank you. Answer any questions Mr. Tuck [760] or Mr. Jenkins may have.

THE COURT: Mr. Tuck.

CROSS-EXAMINATION

BY MR. TUCK:

Q. I believe under direct examination you indicated that it was about 7:00 when you got called out, is that correct?

A. Sometime thereafter 7:00 p.m.

Q. And do you recall testifying at a proceeding before this? Do you remember indicating it was about 9:00 when you got called out?

A. I said it was after 7:00.

Q. Okay. Was it 9:00? Is your memory –

A. It was dark. It was the 12th of December, ah, sometime after 7:00 p.m., yes.

Q. All right. Now, was the motor running on this vehicle?

A. Yes.

Q. All right. And so the window is down about five inches, is that correct?

A. Approximately, yes.

[761] Q. And I believe you indicated that you had trouble hearing when he, at different points in time, the conversation, is that correct?

A. That's correct.

Q. And when he made this statement, now, why were you having difficulty hearing him before this date?

A. Ah, it had a lot to do with the volume of his voice, –

Q. All right.

A. I would guess –

Q. The –

A. Running of the car. The fact that the window was cracked five or six inches itself.

Q. All right. Did it have anything to do with you standing back away from the car at times?

A. Ah, some times, I would pull away from the car, yes.

Q. And were you standing back away from the car when he made that statement?

A. What statement is that?

Q. Me? The me statement?

[762] A. Ah, I was close enough to hear what he had said.

Q. Were you standing back where you had had trouble hearing him prior when he made that statement?

A. No, I was pretty close to the car then because we were engaged in a conversation.

Q. Do you recall your testimony at a prior proceeding?

A. Yes.

Q. And do you recall indicating that you were back away from the car?

A. I had backed away, yes.

Q. All right. So, you were back away where you had had trouble hearing prior to this, is that correct?

A. Yes.

Q. And I believe now you've indicated from your statement that you said in, on, that you gave Gary Price, do you have that statement?

A. Yes, I do.

Q. And you have that in front of you?

[763] A. Yes, I do, sir.

Q. And Page 2.

A. Okay.

Q. At the top, I backed away from the car –

A. Uh-huh.

Q. And I thought I heard him say me.

A. That's correct.

Q. Is that a correct statement?

A. That's correct.

Q. So, on December the 7th, you thought he heard, –

A. That's correct.

Q. You heard? Did you make any other statements to law enforcement officers that you're aware of?

A. Hum, not that I'm aware of, no.

MR. TUCK: All right. I'm going to show him a case summary from Giles County. I believe it was prepared by Gray Price.

MR. SCHWAB: For what purpose, may I ask?

* * *

[773] well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his

accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and [774] Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is [775] another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't

want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if [776] the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, –

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

[777] is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say [778] is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on –

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I –

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record *Douglas v. Alabama*, –

THE COURT: And that has already been submitted and reviewed by the Court –

MR. TUCK: I believe that's correct. *Brutan v. United States* –

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe *Crews v. New York*. I also believe I had submitted to the Court two other cases. That was an *Idaho v. Wright* and just to [779] briefly discuss *Idaho v. Wright*, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it

has been consistently held that that right does not override everything else, including and mentioned [780] specifically in the *Idaho v. Wright* that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the *Idaho case* because the *Idaho case* involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is [781] that the whole statement can come in. The Court has seen in the *Scaggs case* and the *Chandler case* which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell,

the U.S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the [782] confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against [783] self-incrimination. What is your opinion as to

whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you –

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the [784] points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay

statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving [785] statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

[786] MR. TUCK: Your Honor, on the record, Mr. Jenkins has stepped out to make an important phone call. We're only here to allow the jury to be released and I have spoken with my client and he has no objections to us simply going ahead and releasing the jury, ah, for lunch.

THE COURT: All right, thank you. I have given in. It seems like every party in interest here wants a lunch recess and I was hoping we could go a bit longer since the jury has been in recess for sometime and I know when I, it's time to give up and that time has come. If you'll bring the jury in, please.

THE COURT: Ladies and Gentlemen of the Jury, I have been persuaded that now is perhaps the appropriate time to take a lunch break and I've given in to the way of all the principals in this matter and I am going to declare a recess now for lunch and we will return at 1:00, and once again, the admonishments that I've given you each time are still in effect. Thank you. Mrs. Skidmore, would you take them out for lunch, please?

LT. SKIDMORE: Please remain in the [787] Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as

well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the [788] hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted.

The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

[789] MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on *Brady* I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

* * *

[798] THE COURT: All right, gentlemen, we need to set up a place in which you can review those tapes.

MR. TUCK: Is that part –

MR. SCHWAB: The tapes and a speaker are available and the witnesses are in the next room.

THE COURT: All right. Is the speaker and the tapes, I mean the speaker, –

MR. SCHWAB: Yes, but considering the proximity to the jury it might be better if they meet some place else.

THE COURT: What about the attorneys' lounge?

MR. TUCK: Why don't we use one of the rooms over here or the lawyers' lounge. That would be fine, Your Honor.

THE COURT: That would be fine or you can do it in Mrs. Cole office and obviously we want be a party, but I imagine the lawyers' lounge would be more appropriate. All right, Mr. Schwab, would you make them available –

* * *

Testimony of Mark Lilly/Direct

[804] THE COURT: All right, Mr. Clerk.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MARK LILLY: Yes.

THE COURT: Thank you, sir. Have a seat there, please, and answer questions on behalf of the Commonwealth and questions on behalf of the defense.

MARK LILLY, A WITNESS OF LAWFUL AGE, AFTER FIRST BEING DULY SWORN, DEPOSED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. SCHWAB:

Q. Would you tell the judge and the jury your name, please?

A. Mark Lilly.

Q. Mr. Lilly, I want to direct your attention to December the 4th and 5th of last year. Were you with Benjamin Lilly and Gary Barker?

A. I'd like to take the Fifth on that.

[805] Q. Did you, don't wish to answer any questions?

A. Yeah, I'll take the Fifth.

Q. Thank you.

THE COURT: All right. Any questions based upon his response?

MR. JENKINS: Your Honor, we, would you be willing to answer questions for the defense?

A. No, I'd have to take the Fifth.

THE COURT: All right, sir. Anything else, Mr. Schwab?

MR. SCHWAB: Not for this witness, Your Honor.

THE COURT: All right, sir. if the jury would go out just a moment, please. Y'all will lose five pounds this afternoon from, from your exercise.

THE COURT: All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth [806] has met its burden in determining the unavailability of his testimony, so, therefore, in conjunction with the Court's prior ruling that finding is made.

MR. TUCK: Your Honor, that's a continuing ongoing objection. Your Honor, we reserve the right to recall this witness. He may at some point in time elect not to and I believe we have the right to recall him and he may or may not testify in the future. It all depends.

THE COURT: That's correct. All right, Mr. Lilly, you are excused subject to recall with the admonishments that you are not to discuss whatever testimony you gave with any other individual nor allow them to make any conversation with you concerning what you have said on the stand nor or you to hear, view nor read any accounts, news accounts of your testimony. All right, sir. Thank you.

MR. SCHWAB: At this time, may he be returned to the Giles County authorities?

THE COURT: If you do intend to recall him, –

• • •

[809] midnight, if I'm correct?

A. Yes, it was 9:47 on December the 5th.

Q. And you've testified that you spoke with, in the course of your investigation, the defendant, Benjamin Lilly, at about 4:00 in the morning? I think the official time is 3:55 a.m.?

MR. TUCK: We'll be willing to stipulate that so Mr. Price does not have to go through his notes or something to that effect.

Q. All right.

A. That sounds correct, yes, sir.

Q. Did you also in the course of that night, early morning speak with Mark Lilly?

A. Yes, sir, I did.

Q. And where was that?

A. It was at the, in the interview room at the Sheriff's Office, investigation section.

Q. Was he under arrest at the time?

A. Yes, he was.

Q. Was your interview with him taped?

A. It was, yes, sir.

[810] Q. Did you request while the tape was running a waiver of his Miranda Rights?

A. Yes, sir, I did.

Q. Was there also a written waiver?

A. Yes, sir, there is.

Q. So, you advised him that anything he might say could be used against him?

A. Yes, sir, I did.

Q. Have you also had that tape transcribed? That interview with Mark Lilly transcribed?

A. Yes, sir, I have.

Q. Have you reviewed your transcription?

A. I have.

Q. And is it accurate?

A. Yes, sir, it is.

Q. Do you have the tape with you at this time?

A. Yes, I do.

Q. Would you set it up to play?

MR. SCHWAB: Your Honor, I believe defense has been provided with copies of the transcript.

[811] MR. TUCK: Your Honor, again, –

THE COURT: I understand you have.

MR. TUCK: Again, it's a continuing ongoing objection.

THE COURT: All right, sir, but you have been provided –

MR. TUCK: But we have been provided copies –

THE COURT: With a copy of the transcript?

MR. TUCK: Of the transcript, not –

MR. SCHWAB: What is the objection?

MR. TUCK: Not of the tapes I believe is what I was going to say.

MR. SCHWAB: Don't turn it on quite yet.

Q. Did you just a short time ago have a chance to look over your transcript again?

A. I have reviewed it today, yes.

Q. Would you look and see if that's an accurate copy of the transcript?

A. Yes, it is.

[812] Q. Thank you.

MR. SCHWAB: At this time, Your Honor, there are three copies and one for the Court, one for the Court Reporter and one for the Clerk, as well as twelve other copies, oops, I need fourteen, and that's what the other two are for. Fourteen copies, I'm sorry, Your Honor. If they could be passed out for the jury to be used as a guide in listening to the tape.

THE COURT: All right, sir. Thank you. Mrs. Cole, do you have a copy?

COURT REPORTER: Yes, sir.

THE COURT: All right. Mr. Schwab, if you're one short, I have a copy up here.

MR. SCHWAB: Not of this one. The next one, Your Honor. Fourteen passed out of my head today and I was thinking twelve all the way.

THE COURT: All right.

MR. SCHWAB: And if anyone sees, since I didn't a chance to review the copies, if there's a page missing, if they would, please, raise their hand and I'll try to correct the problem.

[813] THE COURT: The pages are numbered consecutively, so that would be a way to determine whether or not a page is missing.

THE COURT: I've got an extra copy here, if that helps.

MR. SCHWAB: Is anyone still missing one? There should be twenty-nine pages.

THE COURT: All right. Go ahead and proceed.

MR. SCHWAB: Thank you, Your Honor.

Q. If you would, investigator, play the tape you made of that conversation on the early morning hours of December the 6th.

TAPE PLAYED INTO RECORD – INTERVIEW WITH MARK ANTHONY LILLY, DECEMBER 6, 1995, AT THE GILES COUNTY SHERIFF'S OFFICE – INTERVIEWER LIEUTENANT GARY PRICE

Q. Investigator Price, there were occasionally other voices. Were they other people in the room with you?

A. No, sir, that's an adjoining room and the mike is a pretty sensitive mike.

* * *

Case# 950789 &
950790

Interview With
Mark Anthony Lilly
December 6, 1995
At the Giles County Sheriff's Office

Interviewer: Lieutenant Gary Price

Interview With
Mark Anthony Lilly

Interviewer: Lieutenant Gary Price
Date: December 6, 1995
Time: 1:35 AM

G.P. State your full name.

M.L. Mark Anthony Lilly.

G.P. Okay Mark, you need to speak up just a little bit cause I can't hear very well. Mark Anthony Lilly?

M.L. Yeah.

G.P. Spell your last name.

M.L. L*I*L*L*Y

G.P. What is your mailing address, Mark?

M.L. Post Office Box 217, Riner Virginia.

G.P. What's your date of birth?

M.L. 6/28/75.

G.P. And your social security?

M.L. 232-08- . . .

G.P. Whoa, whoa, whoa.

M.L. 232-08-3596.

G.P. 232-08-3596?

M.L. Yeah.

G.P. Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions concerning some incidents that took place tonight in our county. And you initially said that you felt like you were still under the influence and that you were not feeling very well. We went downstairs, you asked for some water, and received ice water, and during that time you tell me now that you feel like that . . .

M.L. Well, I'm not.

G.P. that you're in your facilities where you understand and you don't feel too drunk to talk to me. You understand the things that I'm gonna ask about. First off, I'm gonna read the Miranda rights that you have to you, and I want to make sure you feel like you understand these.

M.L. Alright.

G.P. **You have the right to remain silent.** That means you don't have to talk to me if you don't want too. **Anything that do you tell me, I can and will use against you in the court of law if there is charges brought against you. You have the right to talk with an attorney and have him or her present with you while you are being questioned. And if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements.** In other words, you got a right to have a lawyer here with you. If you can't afford one, the court appoint one, and if you

decide to waive your rights and talk to me, then you can still stop at any time you want too. **You understand these rights?**

M.L. Uh huh.

G.P. I'm sorry, you do understand them?

M.L. Yeah.

G.P. Alright, listen to this very carefully. **Having been advised and fully understanding my rights do freely and voluntarily, without threats, promises, pressure, or coercing agree to talk with Gary Price, that's me, a law enforcement officer.** In other words, if you agree to answer questions, it's not because I'm making you do it, I'm not threatening you, you're gonna do it on your own free will. Do you understand that?

M.L. **No Statement Made**

G.P. If you would, say yes or no.

M.L. Yeah.

G.P. Are you willing to answer questions concerning two armed robberies that occurred in Giles County tonight and incidents that led up in Blacksburg and Montgomery County earlier today, or earlier on December the fifth?

M.L. Yeah.

G.P. When was the last time you had a drink?

M.L. Well, ah . . .

G.P. It's right now, 1:30.

M.L. About dark.

G.P. About dark, which would have been about five or six o'clock. So we're talking about seven and a half hours.

M.L. We'd been drinking liquor all day, since yesterday.

G.P. When you say "we" who are you talking about "we"?

M.L. Me, Ben and Gary.

G.P. Who's Ben now?

M.L. That's my brother.

G.P. Ben Lilly?

M.L. Yeah.

G.P. And Gary, who's Gary?

M.L. Barker.

G.P. You any kin to Gary Barker?

M.L. No.

G.P. I'm going to ask you, if you would, these are the rights that I read you, and then I asked you if you understood these rights and was willing to waive them and you said that you were, and that you did understand them. If you would sign that. That tells me, the court, the judge, whoever, that I did read the rights to you and that you understood them and agreed to waive and answer some questions. I will ask you, that if you do agree to talk with me, that you answer all of my questions truthfully.

M.L. Yeah.

G.P. Because you indicated that what has happened tonight is very bad, but you would like to talk about it. And at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred. So, if you're not completely truthful with me, then the court's just not gonna look at this confession or statement as it

should. When did you and your brother Ben and Gary, when did ya'll get together today?

M.L. We've been together a few days. Well, me and Gary has, that's my brother's buddy. We run around together all the time.

G.P. Alright, on this day particularly, and when I say "this day" I'm talking about what is now yesterday, December the 5th which was Tuesday. What time did ya'll get together yesterday.

M.L. Well, we was together all day, cause Ben stayed over at our place.

G.P. Okay. When you say "our place" where is "our place"?

M.L. Over in Blacksburg.

G.P. Where about's in Blacksburg?

M.L. (Not understandable) Court Trailer Park.

G.P. Okay. What time did ya'll leave that residence this morning?

M.L. I have no idea. I'd say it was about, man, I don't really know. Besides, I've been drunk all day, I was drunk when I got up.

G.P. What have you been drinking today?

M.L. Liquor.

G.P. What kind of liquor?

M.L. Vodka, Evan Williams, Jim Beam, little bit of everything.

G.P. Did ya'll buy that different kind of liquor, or how did you come across that liquor?

M.L. They got it out of the house.

G.P. And when you say "they got it out of a house", who are you talking about "they"?

M.L. Ben.

G.P. Talking about Ben and who else?

M.L. Lilly, just Ben.

G.P. Just Ben, or Gary was with them.

M.L. Well the house (not understandable) we was all on it.

G.P. Where's the house located?

M.L. Somewhere up in Floyd is all I can tell ya.

G.P. Was that yesterday?

M.L. Day before or something.

G.P. Now, when we, was it a residence or was it a store?

M.L. Residence.

G.P. So you went to a residence, you got the liquor out, and what else did you get?

M.L. I don't, I don't really know, you know, everything that was got out cause I was drunk.

G.P. How did they get into the residence?

M.L. Kicked in the door or something.

G.P. Who actually went into the residence and brought the items out?

M.L. All of us.

G.P. So you brought out the liquor, several different bottles and different brands?

M.L. Yeah.

G.P. Any other items you brought out?

M.L. That's all that I brought out, that I cared anything about.

G.P. Okay. Did Gary bring anything out of the house or Ben?

M.L. I think they got some guns or something.

G.P. Do you know what kind of guns they brought out?

M.L. Uh, a shotgun, a rifle and a pistol.

G.P. Okay. What gauge shotgun?

M.L. I don't even know.

G.P. Is it a single shot, double barrel, pump?

M.L. Pump.

G.P. Pump, pump action?

M.L. ****No Statement Made****

G.P. And the rifle, what kind of rifle is it?

M.L. I believe it was a .35

G.P. What kind of action would it have?

M.L. Lever.

G.P. And the pistol, is it automatic, revolver, what kind was it?

M.L. I guess a revolver.

G.P. Do you know what caliber it was?

M.L. A .38.

G.P. And they all came out of a residence of Floyd County?

M.L. ****No Statement Made****

G.P. Do you know who's residence it was?

M.L. ****No Statement Made****

G.P. What area was it in? I don't know much about Floyd.

M.L. Ah, like on the way to Indian Valley somewhere.

G.P. Okay. On the way to Indian Valley.

M.L. Yeah.

G.P. What kind of house, was it a brick residence, wooden residence, aluminum siding?

M.L. Aluminum siding.

G.P. Do you know what color?

M.L. It was dark.

G.P. Did this happen during daylight hours or after dark?

M.L. After dark.

G.P. No one was at home?

M.L. Everything looked dark anyway, you know, no one was home.

G.P. Okay. Now up until yesterday when ya'll left, all three of you left yesterday in Blacksburg, you say you don't remember about what time that was ya'll left your house or wherever you were staying and started driving around?

M.L. Huh uh.

G.P. Was it daylight?

M.L. Yeah. About the time it started raining, I guess.

G.P. What were ya'll driving around in?

M.L. Thunderbird.

G.P. What kind?

M.L. Thunderbird.

G.P. Who's Thunderbird is it?

M.L. Well, it's a dam Mercury Cougar.

G.P. Mercury Cougar?

M.L. Yeah.

G.P. Who's was it?

M.L. Ben's.

G.P. What color was it?

M.L. Like a copper color.

G.P. Okay. Did ya'll drive it around about all day?

M.L. We drove it around for a while.

G.P. You pretty much stay in Montgomery County with that car?

M.L. Well, we tried to hang down at Floyd where the back roads are, you know. Cause the law don't go on the back roads that much.

G.P. And that was yesterday you're talking about?

M.L. Well, yeah. Yesterday, everyday, you know, we try to stay out on the back roads.

G.P. What become of that Mercury Cougar?

M.L. You know, I don't even know what happened to it. I just remember stopping at a dam red, the car cutting out at a red light.

G.P. Your car was cutting out at a red light, it just stopped on you?

M.L. Yeah.

G.P. Who was in the car at that time?

M.L. Me, Ben and Gary.

G.P. So it was still you and Ben and Gary . . .

M.L. Yeah.

G.P. riding during that time. Do you know about what time of day it was?

M.L. Right after dark.

G.P. Okay. What transpired at that time?

M.L. Well, dude wanted to get him another car.

G.P. Who wanted to get another car?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. How did ya'll go about getting another car?

M.L. Well . . .

G.P. Just be honest with me.

M.L. we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

G.P. So who pulled the gun on the dude?

M.L. Ben.

G.P. So Ben pulled the gun, which gun did he pull?

M.L. Pistol.

G.P. Same pistol that was got out of the house over in Floyd?

M.L. ****No Statement Made****

G.P. Did ya'll know this dude?

M.L. That we . . .

G.P. That you got the car from?

M.L. No. I never go to town.

G.P. So you never seen him before?

M.L. Huh uh.

G.P. So Ben told this guy, said "We're gonna take your car and we're gonna take you with us."? So did all of ya'll load into the car then?

M.L. I had to or get left man, I was so drunk.

G.P. Okay. Who drove this dude's car off?

M.L. Ben.

G.P. Ben drove? Who had been up front with him, the passenger?

M.L. Gary.

G.P. Gary would up front?

M.L. Yeah.

G.P. And then that would put you and whoever this dude was in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. Well, not much of nothing man, we just rode. I was so dam scared I was sitting up against the door, man. You know, watching everybody.

G.P. Why was you scared, you had the gun didn't you?

M.L. No. I, I didn't have no dam gun, no.

G.P. Okay. So . . .

M.L. That's the first time I ever been through anything like that, you know, I didn't know how to take things, I just sat back.

G.P. Well, what was the dude saying during, I mean, was he scared or, was he asking to be let out or, begging.

M.L. He didn't act like it, he didn't act like he was scared or nothing.

G.P. How old was this boy that had the car?

M.L. Twenty-five maybe.

G.P. Anything that you remember about him? What he was wearing or anything that stood out?

M.L. I don't really remember man, I was drunk.

G.P. So he was in the back seat with you?

M.L. Yeah.

G.P. So you drove, where did ya'll drive to?

M.L. Uh, down like you're going to McCoy maybe.

G.P. So you left the Blacksburg area like you're going toward McCoy? That's what they call Price's Fork Road, White Thorne Area, McCoy down that area, is that the way you went?

M.L. Down through there somewhere. I know about where you're talking about, I just ain't familiar with it, you know.

G.P. What was ya'll going to do, what was the plan to do with, not only the car, but this guy that was in there with you.

M.L. We just needed a ride somewhere.

G.P. Okay. So you rode down toward the McCoy of Falls Area, what transpired after that?

M.L. Well, we drunk us another, another litter [sic] of liquor I think, yeah a good litter [sic], and then they said something about wanting to go to Giles County.

G.P. Okay. Who wanted to go to Giles?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. Okay. What happened then?

M.L. We ended up down here.

G.P. Okay. Anything else happen in between there?

M.L. Nothing that you don't already know, man.

G.P. Alright. I wanna hear your side of it.

M.L. Well . . .

G.P. If you would speak up, I do have a bad time of hearing.

M.L. Me and the blond headed dude, we didn't have nothing to do with shooting him, you know.

G.P. Who's the blond headed dude?

M.L. Gary.

G.P. Okay.

M.L. We didn't have nothing to do with the shooting.

G.P. Alright. Well, tell me about it.

M.L. Well, it's kinda hard cause he's my fucking brother man.

G.P. I know that. And normally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. Especially if he done it without . . .

M.L. Is he . . .

G.P. Consent of everybody. If ya'll had all said "Yeah, let's all kill him" or something, I think you need to share in it. But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

M.L. Yeah.

G.P. And he's your brother, and I understand that. But I think it's . . .

M.L. Well, is he saying that me and that other dude done it?

G.P. Well, I told you to start,

M.L. ****Statement Muffled****

G.P. I'm not gonna tell you what each person said.

M.L. Well.

G.P. I simply told you before we started that they said you didn't do it. And all I'm asking you for is what you saw and what you heard. I know it's hard to say things against your family, but I think in this matter, I don't think anybody's gonna hold it against you. And as you said, I know what happened, but I need for you to tell me what happened. It's not an easy thing got talk about.

M.L. How many times was that dude shot?

G.P. I can honestly tell you, I don't know. More than once, I know what, but I do not, it didn't occur in my county so I'm not sure how many times he was shot. I'd have to ask the right people. I know it was more than once. Number one, what happened? Ya'll was going down the road, apparently you stopped.

M.L. Yeah.

G.P. Why did you stop?

M.L. Well we was all gonna get out of the car first.

G.P. Okay.

M.L. Then, Ben, you know, he just freaks out, and says "Fuck this we'll take this dude's car and we'll leave him behind."

G.P. Okay.

M.L. You know, and I'm setting up there, "Godam what's be gonna do" me and Gary was. And they go over here beside this fucking I guess it's a dump or some fucking something, I don't know, you know, dude shoots him.

G.P. When you say "dude shoots him" which one are you calling a dude here?

M.L. Well, Ben shoots him.

G.P. Talking about your brother, what did he shoot him with?

M.L. Pistol.

G.P. How many times did he shoot him?

M.L. I heard a couple of shots go off, I don't know how many times he hit him.

G.P. Where were you when this was going on?

M.L. In the back seat of the car still yet.

G.P. So you never got out of the car?

M.L. Right.

G.P. Did Gary ever get out of the car?

M.L. Huh uh.

G.P. So Ben stopped, got out of the car, I guess he made whoever the other guy is, that we don't know his name, made him get out of the car?

M.L. ****No Statement Made****

G.P. And you thought they was just gonna let him off and then take his car, is that what you thought?

M.L. That's what me and Gary both thought.

G.P. Did you hear an argument between these two or did they wrestle or fight or . . .

M.L. I didn't see no fight man, we had the windows rolled up and music blaring.

G.P. Could they, were they arguing or do you think this guy tried to run or, why do you think Ben would shoot him?

M.L. I don't know, don't know that.

G.P. So, you said Ben shot him, did you see the flash or how do you know Ben shot him, let me ask you that?

M.L. Well, he dropped.

G.P. How far was Ben from him?

M.L. It was about as far as from me to them dudes in there.

G.P. Which was about ten to fifteen feet, you think that's accurate?

M.L. I'd say ten to fifteen yards.

G.P. Ten to fifteen yards. Did anything transpire right before he shot him?

M.L. What do you mean?

G.P. I understand that when they found the body, he didn't have his clothes on. Do you remember anybody telling him to take his clothes off or why he wouldn't had his clothes on?

M.L. I don't know.

G.P. How long had ya'll been stopped before you heard the shots?

M.L. About five minutes maybe.

G.P. And then I guess Ben got back into the car?

M.L. Yeah.

G.P. What was said?

M.L. After he got back in the car?

G.P. ****No Statement Made***

M.L. Nothing. I was wanting out, you know, I didn't say nothing to nobody.

G.P. You knew he had shot him?

M.L. Yeah.

G.P. You didn't ask "Why did shoot him?" Or did Gary ask him "Why did you shoot him?"

M.L. No. Neither one of us said a word.

G.P. Did he offer any reason why he did shoot him?

M.L. Huh uh.

G.P. Up until that time, ya'll were the only four in the car? You, Ben and Gary and this guy?

M.L. Right.

G.P. Did you see anybody else there where ya'll stopped?

M.L. I wasn't really looking for anybody.

G.P. Okay. But apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben?

M.L. Yeah, something like that.

G.P. And then you heard, when they fired the shots, were they pow-pow or was there some time in between them?

M.L. Pow-pow, you know.

G.P. Pretty quick?

M.L. Yeah.

G.P. And then he got, did he get back in the car immediately or did he stay outside for awhile?

M.L. Well, he got in, he didn't waste too much time.

G.P. And then he was driving?

M.L. Yeah.

G.P. And then ya'll just pulled off and left?

M.L. Yeah.

G.P. Ya'll didn't check on the guy to see if he was dead or did Ben check on him and say he was dead?

M.L. It scared me man, I wanted to get the hell out of there.

G.P. No, but did Ben say "He's dead"?

M.L. Yeah.

G.P. Ben did say he was dead, so Ben walked back to him you think and checked him?

M.L. I don't know if he walked back but he must have knew something.

G.P. Would he have had enough time, from the time you heard the shots, to have walked back to him and then come back and got in the and drove off?

M.L. Do what now?

G.P. What I'm saying, you said he was about ten or fifteen yards away, would Ben had enough time to shoot him, walk over to him and check to see if he was dead and then come back and get in the car? You said there was a little time period in there from the time you heard the shots until the time Ben got back into the car. And Ben knew he was dead, Ben told you he was dead. So, apparently Ben had checked him or for some reason thought he was dead.

M.L. Yeah, or he could'a stood there too.

G.P. Did Ben say where he shot him?

M.L. Huh uh. I didn't ask either.

G.P. So ya'll stayed in the car. You were still in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. What do you mean what happened after that?

G.P. Where did ya'll go after you pulled off and left the body and kept coming towards Giles County.

M.L. Well, we just went riding around drinking beer and liquor.

G.P. Okay.

M.L. We got, we stopped and bought us a case of beer somewhere.

G.P. Okay. Do you remember coming into the M & L or the H & L Mini Mart over, I can tell ya it's in the Eggleston area, I don't know if you know where that is. It's out in the country.

M.L. All of these places out in the country.

G.P. Well, these are even more country than most, but it's a little, bitty, country store. There was an old man and an old woman in it.

M.L. I think I remember something about it.

G.P. What do you remember? You know, here again you're being honest and the story matches, all I'm asking is just continue to be honest. What happened when ya'll stopped at that little country store where the old man and the old woman was running it?

M.L. Uh, well, we went in and first of all, they wanted to rob it and they figured that, Ben figured that he was in deep enough, you know, where he shot that mother fucker, you know. I guess he just thought I ain't got nothing to loose [sic], I'll just rob this bitch (not understandable) money.

G.P. Okay. Who went in the store?

M.L. All of us.

G.P. Did any of you carry any weapons with you?

M.L. One of them had one, I didn't have none.

G.P. You didn't have any weapons with you?

M.L. Huh uh.

G.P. Do you know who carried the weapon in?

M.L. Huh uh, I don't know that.

G.P. What kind of weapon did they carry in?

M.L. Well, the pistol.

G.P. Okay. And what transpired when you got inside? How many people were in there other than ya'll?

M.L. Just the old man and woman.

G.P. Alright, when you got inside, where did you go?

M.L. I just walked, let's see, I think it the aisles like that . . .

G.P. Uh huh.

M.L. and that goes back to the beer. And they up here fucking around, and I go back there and get some beer. You know, and part of what went on, they had robbed this mother fucker, you know. And I just thought, "Hell, a twelve pack of beer ain't gonna hurt nothing." So I just took the beer, I took my twelve pack of beer.

G.P. Okay. You didn't pay for it, you just took it?

M.L. Right. I was so drunk, I don't do that shit, you know, if I'm sober. I had money in my pocket. I figured.

G.P. Did ya'll, was any money taken from the store that you know of?

M.L. They got some.

G.P. Did you end up with any of it?

M.L. Three ways.

G.P. Okay. Ya'll split it evenly three ways. You know how much your share was?

M.L. It wasn't much man, about a hundred, under a hundred dollars.

G.P. Did ya'll fire any shots in to that store?

M.L. No.

G.P. No shots were fired there, no . . .

M.L. No.

G.P. was the man and woman hurt to your knowledge?

M.L. Not to my knowledge, no.

G.P. Okay. When you went in there, of course, Ben already told "Let's go in there and this store." So you all three went in there, one of them carried a gun, you don't whether it was Ben or whether it was Gary?

M.L. Right.

G.P. Did, what did Gary bring out of it?

M.L. Beer.

G.P. He had beer, did he have anything else?

M.L. I don't know.

G.P. What did Ben bring out?

M.L. I ain't for sure man.

G.P. Alright when ya'll split the money up a little later, who pulled the money out, who had the money?

M.L. It come from the back. This time I was riding up front.

G.P. Okay. So, when you left the store ya'll had a, who was driving when you left?

M.L. Gary.

G.P. Gary was driving and you were up front?

M.L. Yeah.

G.P. And then that would have put Ben in the back?

M.L. Yeah.

G.P. From once you robbed the store, all three of you got back in the vehicle, what did you do then?

M.L. When all three of us got back in the vehicle?

G.P. Uh huh.

M.L. We took off.

G.P. Okay. Did ya'll stop anywhere along the way after that, before you got to the next store?

M.L. Huh uh.

G.P. When did ya'll divide the money up? You said ya'll divided it three ways and it was about a hundred dollars all together.

M.L. Down at the sandbar.

G.P. Okay. That was, of course, that was obviously after you left the store, you already had the money. Then you said the money came from back, so it must have come from Ben, right?

M.L. ****No Statement Made****

G.P. Is that a yes or a no?

M.L. Yeah.

G.P. Okay. So ya'll pulled in down around the sandbar, split the money, and then where did you go after that?

M.L. Over to the other store.

G.P. And when you say "to the other store" are you familiar with Pembroke?

M.L. ****No Statement Made****

G.P. But you went to another convenient store type establishment?

M.L. Yeah, across from Dairy Queen.

G.P. Okay. Who went in the store there?

M.L. Me and Gary.

G.P. And where was Ben on that one?

M.L. Driving.

G.P. Ben was driving?

M.L. ****No Statement Made****

G.P. Did you carry a weapon in with you . . .

M.L. Huh uh.

G.P. when you went in the store? Did Gary carry a weapon in?

M.L. Yeah, Gary had one.

G.P. What did he carry in with him?

M.L. A pistol.

G.P. Okay. You stopped there apparently if you went in with a pistol and all you stopped there to rob that store, is that right?

M.L. We stopped there for something, I don't know.

G.P. Did ya'll discuss it before you went in, say "Ben you stay here and we're gonna go in and rob this" or what was the discussion?

M.L. We was all so drunk.

G.P. Okay. But you remember you went in, Gary went in, he had the pistol and Ben stayed in the car. What happened once you got inside?

M.L. Well . . .

G.P. Who went to the clerk, who talked to the clerk?

M.L. Gary.

G.P. Okay. And do you know what Gary asked her or told her?

M.L. No, she, but it must have been funny cause she was laughing, she wouldn't stop laughing.

G.P. Okay. Did Gary show her the gun?

M.L. Yeah.

G.P. And tell her this was a robbery?

M.L. Yeah.

G.P. And she was laughing?

M.L. ****No Statement Made****

G.P. Okay. What happened, transpired at that time?

M.L. Some old man from outside come in and seen what taking and he tried taking the gun from Gary.

G.P. Uh huh. And then what happened?

M.L. Well, they got their stuff, we got broke up and we left.

G.P. Ya'll jumped back in the car?

M.L. Yeah.

G.P. Where did you get into, front or back?

M.L. I don't even remember, man. Back maybe.

G.P. Okay. And then you drove off?

M.L. Yeah.

G.P. What happened as you drove off?

M.L. Nothing really.

G.P. Do you recall someone firing a shot out the window because someone was following you?

M.L. Yeah.

G.P. Who fired the shot out the window?

M.L. I don't know. I don't know who fired the shot.

G.P. Alright. If Ben was driving, Gary was in the front seat and you were in the back, did you fire the shot?

M.L. I don't even know if I was in the back. I could have been in the front.

G.P. Okay.

M.L. I don't know.

G.P. Gary could have been in the back.

M.L. Yeah.

G.P. We know Ben was driving.

M.L. Yeah.

G.P. Well, did you fire the gun?

M.L. Huh uh.

G.P. Which gun was fired?

M.L. I don't know.

G.P. But you remember hearing a shot, but you don't know whether Ben or Gary fired it?

M.L. Right.

G.P. And then what happened shortly after that?

M.L. We lost 'em.

G.P. Okay. So you know the reason the gun was fired was cause someone was following you very closely?

M.L. Yeah.

G.P. Did they fire the gun at the car that was following you or just shooting it up in the air?

M.L. I don't know.

G.P. Okay. Do you remember what happened when your vehicle stopped?

M.L. ****No Statement Made****

G.P. How come ya'll to stop and leave your car?

M.L. It blowed up.

G.P. Just stopped running with you?

M.L. Yeah.

G.P. What did ya'll attempt to do then?

M.L. Walk.

G.P. And then is that when the police showed up?

M.L. Uh huh.

G.P. What did Ben do when the police showed up?

M.L. I wasn't around, I don't know.

G.P. What did you do?

M.L. I was already gone.

G.P. Where did you go?

M.L. Running down the road.

G.P. Did you go into the wooded area at all?

M.L. ****No Statement Made****

G.P. Was, that's a yes, is that right? You did go into the wooded area some?

M.L. ****No Statement Made****

G.P. Where did Gary go?

M.L. I don't know, I lost him.

G.P. What did you carry with you when you left the car and took off running?

M.L. I didn't have nothing.

G.P. Was you carrying the pistol with you?

M.L. I didn't have shit man.

G.P. You didn't have the pistol with you. My understanding was you did have a pistol and I may be wrong.

M.L. No.

G.P. You didn't have the pistol?

M.L. Huh uh.

G.P. You didn't take any guns or anything with you when you ran?

M.L. Huh uh.

G.P. Okay.

M.L. Just spur of the moment man, I seen the law and I was gone.

G.P. And where were you picked up?

M.L. Huh?

G.P. Where were you picked up? Did the police pick you up?

M.L. Up there where that dude rents canoes on 460.

G.P. How did you get up there? Did you walk all the way, or run?

M.L. Jog.

G.P. Didn't get a ride or anything, jog all the way up there?

M.L. ****No Statement Made****

G.P. Everything you told me is true, to the best of your recollection?

M.L. Yeah.

G.P. Okay. Take a break there and I'll be right back. Did you drink all that? I'll get you some more water here in a minute.

M.L. Alright.

G.P. What did you tell the police your name was?

M.L. Michael Raider.

G.P. Michael Raider? Why did you do that for?

M.L. I just did.

G.P. Is there a Michael Raider, do you know one?

M.L. Yeah.

G.P. How many people was with ya'll tonight? Not counting the guy that got shot?

M.L. Just me, Ben and Gary.

G.P. There never was a forth [sic] person then?

M.L. Huh uh.

G.P. Okay. Anything you wanna ask me?

M.L. Huh uh.

G.P. You, go ahead . . .

M.L. What all are you going to try and charge me for?

G.P. Well, here in Giles County, by your own admission and by statements of others, plus you'll be identified by the store owners and things, you'll be charged with two counts of armed robbery. And you'll be charged with using a fire arm in the commission of a felony. That doesn't necessarily mean that you had the gun on you, but a gun was used in the commission of a felony in that armed robbery. That's the things that I'll charge you with. Naturally, Blacksburg and Montgomery County and Floyd County officials are gonna be talking to you about what happened in their county. At any time today, have you fired a weapon at all?

M.L. Yeah.

G.P. Where did you fire a weapon?

M.L. I don't remember where it was at, but I did.

G.P. Do you remember what you shot at?

M.L. A beer can.

G.P. What, which weapon did you use?

M.L. A pistol.

G.P. Okay. My evidence tech, in a few minutes, I'll ask your permission to take a gun shot residue which is a little thing that they dab on you to collect any gun powder that's on you. If you say you shot the gun,

then he'll probably find some, but he'll still do it as something that we have to do. He'll ask you permission to do it, so.

M.L. Yeah.

G.P. If you have no more questions of me, I will end the interview at 2:12 AM.

Transcribed by:

Christy Cumbee

Testimony of Gary Price/Cross

* * *

[814] Q. All right. And for those of us who don't know that much about Pembroke, is there a Dairy Queen near the M & W Mark, Market?

A. It's directly across from the Dairy Queen.

Q. Same side of the street?

A. No, sir, opposite side.

Q. Okay. And that was the only time you spoke with Mr. Mark Lilly about these incidents?

A. That's correct.

Q. Thank you. Answer any questions the defense may have, please.

THE COURT: Mr. Tuck.

CROSS-EXAMINATION

BY MR. TUCK:

Q. I'm going to draw your attention to page, well, I think they need to collect the transcripts first, but I'm going to draw your attention to Page 4 of the transcripts. I believe that Page 4, you ask a long question at the bottom of that, when did you, ah, and your brother and Ben and Gary, when did y'all get together today? And I believe Mark Lilly's response and [815] correct me if I'm wrong was, we'd been together a few days, well, me and Gary has, that's my brother's buddy. We all run around together. And it's his brother's buddy, is that correct? Is that what he said?

A. I'm, I'm still looking, sir.

Q. Okay. Page 4, center.

A. Okay.

Q. Now, he would later give you indications that he and Gary Barker were in fact living together, is that correct? He said that it was his brother's buddy, but later on he gave you indications that he, he being Mark Lilly, and Gary Barker were living together, is that correct, in Merrimac?

A. Yeah, I later learned that. I'm not sure exactly who furnished me that information.

Q. You didn't learn that information from Mark?

A. I may have. I just don't recall without refreshing my memory.

Q. Now, Page 5, I believe you were asking him about the, where they got the liquor at and I believe you [816] asked him a question, and when you say they got it out of the house, who were you talking about they? Is that correct? You asked that question?

A. That's correct.

Q. And his response was what?

A. Ben.

Q. Okay. And then you asked him, you talked about Ben and who else and then what was his response?

A. Lilly, just Ben.

Q. Now, later on I believe you indicated that –

MR. SCHWAB: The tape is what speaks for itself. If the defense counsel would like the tape played again at certain parts, we have no objection, but he's asking the officer from the transcript what he said and I believe the purpose of the transcript was to aid the jury and they are the deciders of the facts, not myself, not the investigator, nor Mr. Tuck.

THE COURT: That, that is correct, Mr. Tuck.

MR. TUCK: Your Honor, he was present [817] and now I'm sure he's not going to remember this conversation verbatim and we can go through and say do you recall asking him this question and I will take the transcript over to him and he'll say, yes, I did ask that question, and I'll say do you recall that response and then we can go through that and we'll be here for the next –

THE COURT: That will be more cumbersome, I admit, but over the objection of the Commonwealth, I think the objection is well taken, so I think we need to utilize the –

MR. TUCK: If the Commonwealth wishes to object, then we'll go through it in that, that process. I was just looking to save the Court and the –

THE COURT: Right. I think because of the objection, we need to utilize the tape.

MR. TUCK: Utilize the tape or refreshing the individual's memory?

THE COURT: Refresh, refresh his memory.

MR. TUCK: Okay.

[818] Q. Page 5, do you remember asking a question about what they got out of the house or who were, were they talking about they? Do you remember, do you recall asking that question?

A. Yes, I do.

Q. And do you recall what the answer was? When they, when you indicated they, do you recall –

A. I asked, ah, they got at a house, who are you talking about they? Mark Lilly, Ben.

Q. Okay. And did, did you then later ask a question about Ben and who else?

A. My next statement was, talking with Ben and who else? Mr. Lilly stated, or Mark Lilly stated, Lilly, just Ben.

Q. Now, I believe, now, let's, let's go back a second. Before this interview, had you told Mark Lilly hat you had spoken with anyone?

A. Yes, I had.

Q. And who did you tell him that you had spoken of? Was it Gary Barker?

A. It would have been Gary Barker because [819] that's the only one I had spoken with.

Q. So, you talked to Gary Barker right before that. Then you indicated, I believe you asked him another question, just Ben or was Gary with him, or with them?

A. That's correct.

Q. And did you later, ah, did he later admit that, well, we were all in on it?

A. That's correct, he did.

Q. But his first indication was, it was just Ben, is that correct?

A. That was the answer that he gave, yes, sir.

Q. Now, he indicated that when they were over in Floyd, he was already intoxicated, is that correct, before they had broken in? I'll draw your attention to Page, top of Page 6 and bottom of Page 5, if that would refresh your recollection.

A. I asked the question, so, you went to a residence, you got the liquor out and what else did you get?

[820] Q. And –

A. And Mark Lilly's reply, I don't, I don't really know, you know, everything that was got out because I was drunk.

Q. Okay. So, he was drunk at the time, before he had went there?

A. That's the indications, –

Q. Is that correct?

A. Yes, sir.

Q. You also indicated or asked some questions about the residency. Did he indicate whether he knew who the person's home was that they were robbing or where it was?

A. He indicated in Floyd County, somewhere around Indian Valley.

Q. And I believe there's no statement, did he indicate that he knew where it was exactly or specifically or did he know the person?

A. His response or indication was, he did not know the people or did not know exactly where it was.

Q. Now, Page 9, and we're now getting into [821]the where I think you're asking him questions, refresh your recollection about the Price's Fork area and you asked him to, you asked him about the car and how he got it. And do you recall what he said after you asked him that question or asked him to be honest with you?

MR. SCHWAB: Your Honor, I again object. It's not what he recalls. It's what the tape says.

THE COURT: It is and I'm going to let you, let Mr. Price refresh his memory –

MR. TUCK: All right. I'll be happy to.

THE COURT: Of the transcript.

A. My last statement, just be honest with me and Mark Lilly replied, we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

Q. All right. He didn't mention any taking a wallet out or anything along those lines or hiding behind trees at any point in time, did he?

A. Ah, not to be, no, sir.

Q. He was just walking across, straight [822] across the parking lot?

A. We went across the parking lot.

Q. And there was no indication that Ben asked him for the gun or anything along those lines, is that correct?

A. His statements to me, there was no indication, no.

Q. That Ben had the gun? Already, so, because he pulled it, is that correct?

MR. SCHWAB: Your Honor, he's asking him questions that have already been presented in the tape.

THE COURT: Yeah, once again, we've got to confine them to his recollection as refreshed by, by the tape.

Q. All right. To your recollection, do you recall him saying that Ben Lilly already had the gun or indicate that he already had the gun or did he say that Ben Lilly asked him for the gun?

A. My recollection –

Q. Based on your recollection, based on your conversations that, your memory?

[823] A. Yes. My next statement was, so who pulled the gun on the dude? And Mark Lilly's reply was, Ben, indicating to me that he already had the gun.

Q. All right. I believe he also indicated that he never went, never went to town, is that correct?

A. When I asked him if he knew the subject, his indication was, I didn't know him because I never go to town.

Q. Now, did he indicate that he didn't have a gun at any point in time? Would that be a correct statement that he never had any guns? He personally?

A. At the end of the tape, he said that he had fired the gun that day.

Q. All right. He fired a gun earlier in the day at a beer can?

A. That's correct.

Q. Other than that one indication, did he ever indicate –

MR. SCHWAB: Objection, Your Honor. That is a question for the jury to decide. Not for Investigator Price to decide.

[824] THE COURT: Right. As I say, –

MR. SCHWAB: They have heard the tape.

THE COURT: As I say, you must stay within the tape and you may use the transcript to have Mr. Price, allow Mr. Price to refresh his memory.

Q. I would draw your attention to Page, the bottom of Page 10, and at the top of Page 11. I believe they're riding down the road at this point in time. I draw your attention to that area. Did he indicate that he had a gun at that point in time?

A. He indicated that, ah, his statements, no, I, I didn't have no damn gun.

Q. Now, on Page 13 he asked you the question if you remember it whether Ben was saying that he and

Gary Barker were involved, is that correct? Saying that, Ben was saying that they had done it. Do you recall that? Page 13.

A. I had just asked him a question and he's your brother and I understand that, but I think he, I think it's and Mark Lilly said, well, is he saying that me and the other dude done it?

[825] Q. So, that was one of his questions to you, is that correct?

A. That's correct.

Q. Now, did he ever, going to the Whitethorne landing, did he ever indicate that he had ever gotten out of the car?

A. No, sir, he did not.

Q. In any of his statements or any of the tape, did he ever indicate that they'd had Alexander Defilippis cover his face at any point in time during the course of the, the carjacking to when Alexander Defilippis is killed? In any of the, in any of the statements, do you recall him ever making that statement during, Mark Lilly making that statement ever?

A. That they had the victim cover his face?

Q. Yes. Or close his eyes or put his head down or anything along those lines?

A. Not to my knowledge, no.

Q. And I believe he indicated that they never got out of the car? He and Gary Barker never got out of the car at the Whitethorne landing?

[826] A. That's correct.

Q. Now, Page 15, did Gary Barker, or not, excuse me, Mark Lilly indicated that when Benjamin Lilly supposedly shot Alexander Defilippis it was, I believe you asked him a question about ten, fifteen feet and he said, no, ten, fifteen yards, is that correct?

A. That was his reply, yes.

Q. That was his words, not yours?

A. Mark Lilly's.

Q. Mark Lilly's words, ten to fifteen yards?

A. Yes.

Q. Did he ever indicate that it was a point blank, that he was up point blank, it was always ten to fifteen yards, is that correct?

A. It, the, I think the two references he made both times were ten to fifteen yards.

Q. So, that's thirty to forty-five feet, is that correct?

A. That's correct.

Q. I was just checking my math. Now, Page 16, I believe that there was indication, ah, –

[827] MR. SCHWAB: Your Honor, I'm again going to object because he's doing nothing but reading the transcript. He can't cross-examine the investigator for what was on the tape. What was on the tape speaks for itself.

THE COURT: All right. But you may refresh his memory by showing him a copy of the transcript.

Q. Did you ask Mr. Lilly why his brother had done this or if he stated why he had done this?

A. My question, you didn't ask why did he shoot him or did Gary ask him why did you shoot him and Mark Lilly's reply, no, neither one of us said a word.

Q. And did you ask him if he offered a reason why he did it?

A. Yes, I did.

Q. And –

A. Mark Lilly's reply was huh-uh.

Q. Now, you, I believe you indicated or asked him a question about what the lighting was like at the bottom of Page 16. Refresh your recollection. I believe [828] that he indicated that he could see thirty to forty-five feet, is that correct?

A. Ah, I –

Q. Ten to fifteen yards?

A. My statement was, apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben? Mark Lilly's reply, yeah, something like that.

Q. And I believe he indicated that Benjamin Lilly got in the car and left the scene driving. He was the driver I believe.

A. He was the driver as they left that Whitethorne area.

Q. I believe Mark Lilly indicated that he was in the back of the car the whole time and never got out of the car, is that correct? Page 18.

A. That was his statements to me, yes.

Q. Did Mark Lilly indicate who carried the firearm into the store over in Eggleston? Did he say he could remember who did that? Page 19.

A. Indicated he did not carry one, but [829] someone had.

Q. Could he tell you who had? Which one of the two? You've got Gary and Ben Lilly there. Could he tell you?

A. My question to him, do you know who carried the weapon in? And Mark Lilly replied, huh-uh, I don't know that.

Q. And I believe you asked him some questions regarding why did he take the beer at the bottom of Page 19, the top of Page 20. He indicated that he had money enough to pay for the twelve pack of beer in his pocket.

A. Yes, Mark Lilly just indicated he took twelve, a twelve pack of beer. My question, okay, you didn't pay for it, you just took it? And Mark Lilly's reply, right. I was so drunk I don't do that shit, you know, if I'm sober. I had money in my pocket.

Q. And I believe on Page 21 he's indicated that Ben was the one who took the money out of the cash register, is that correct? Page 21. They split the money and the money comes from the back –

MR. SCHWAB: Objection, Your Honor. I, [830] could he ask him if he asked who took the money out of the cash register –

Q. Did you ask –

MR. SCHWAB: Or where did the money come from?

Q. Or where did the money come from?

THE COURT: Just refer to the transcript.

MR. SCHWAB: Thank you, Mr. Tuck.

Q. Page 21.

A. Yes. My question, all right, when y'all split the money up a little later, who pulled the money out, who had the money? Mark Lilly's reply, it came from the back. This time I was riding up front and –

Q. Okay.

A. And my next question, so, when you left the store, who was driving when you left? Mark Lilly's reply was, Gary, which would have placed Ben in the back.

Q. So, based on that statement, that's why you indicated it came from Ben? The money came from Ben?

A. That's correct.

[831] Q. Because he was in the back. Now, on Page 23 you indicated that I believe the individual will be known as Mona Hylton was laughing when she was being robbed?

A. That was his statement, yes.

Q. And he stuck with that statement? Did he repeat it? You asked him, she was laughing I believe. Do you recall that?

A. Yes, I asked it and I said, okay, my statement, okay, and do you know what Gary asked her or told her and Mark Lilly's reply was, no, she, but it must have been funny because she was laughing. She wouldn't stop laughing and my statement, or my question, okay, did Gary show her the gun? Mark Lilly replied, yeah. And my statement, and tell her this was a robbery? Mark Lilly's reply was, yes, and she was still laughing.

Q. Did you ever ask him the question who fired the shot out of the car window after they left Pembroke? Page 24.

A. Yes, I did.

Q. And was he able to tell you who had fired [832] the shot out of the car? Did he indicate whether it was Gary or Ben or himself?

A. He indicated it was not him.

Q. Okay. But did he, could he say it was Gary or Ben? If you recall.

A. His answer, ah, who, my question, who fired the shot out the window? Mark Lilly, I don't know. I don't know who fired the shot.

Q. Now, I believe after their stop, you asked them a series of questions, after they had been stopped. And I'm drawing your attention to Page 26. You asked, did you recall asking him of, if he had anything or had the pistol?

A. Yes, I did.

Q. And what was his indication?

A. My question, was you carrying the pistol with you? And Mark Lilly's reply, I didn't have shit, man. And I further asked him, you didn't have the pistol with you? My understanding was you did have a pistol. I may be wrong. Mark Lilly's reply was, no.

MR. TUCK: Your Honor, if I might have a [833] moment?

THE COURT: All right, sir.

MR. TUCK: Your Honor, I don't believe I have any further questions.

THE COURT: All right, sir.

MR. TUCK: The Commonwealth may have some on redirect.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab, do you have any questions on redirect?

MR. SCHWAB: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. I believe Mr. Tuck asked you if there was a, one of the pages where he said, ah, what's the other guy saying? What are they saying about me? Do you recall what page that would have been on the transcript?

MR. TUCK: I believe it would have been, be Page 13, if that would be helpful to the Commonwealth.

MR. SCHWAB: It was Page 13?

MR. TUCK: Page 13, center of the [834] page, and I –

Q. So, he hadn't, you hadn't asked him any questions, about and he hadn't asked you any questions about who had said who had done what, is that correct, up till Page 13?

A. Up to that point, yes.

Q. And wasn't it on Page 9 that he said Ben was the one that used the gun to kidnap Mr. Defilippis? If I recall correctly.

MR. TUCK: Bottom of Page 9, if it helps the Commonwealth.

A. My statement, how did y'all go about getting another car? Mark Lilly's reply, well, I stated, just be honest with me. Mark Lilly, we went across the parking lot and dude pulled a gun on this other dude and told him we're taking his car and he was going with us. My question, so, who pulled the gun on the dude? Mark Lilly's reply, Ben.

Q. So, that was before he wanted to know what Ben was saying or what anybody else had said, is that correct?

[835] A. That was Page 9 as opposed to Page 13, that's correct.

Q. And would you, I want to make sure I got, the quote was right on Page 13, is that what's in the transcript, is that what you recall being on the tape? Mark Lilly's response?

A. Are we referring to the response, well, is he saying that me and the other dude done it?

Q. No, the top of Page 13, I'm sorry.

A. Where I advised him, I know that and normally I can –

Q. The, the his response. I believe it was to your question, well, tell me about it. From Page 12 and then it –

A. Okay. My question, all right, well, tell me about it. Mark Lilly's response, well, it's kind of hard because he's my fucking brother, man.

Q. Thank you.

MR. SCHWAB: That's all the questions I have, Your Honor.

THE COURT: All right. Thank you, Mr.

* * *

[842] THE COURT? All right, Mrs. Skidmore, if you'd bring the jury in, please.

THE COURT: Mr. Schwab, call your next witness.

MR. SCHWAB: Investigator Ron Hamlin, of the Montgomery County Sheriff's Office.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

RON HAMLIN: I do.

THE COURT: Thank you, Mr. Hamlin. If you'll answer questions put forward by the Commonwealth and the defense, please.

MR. HAMLIN: Yes, sir.

RON HAMLIN RECALLED

DIRECT EXAMINATION

BY MR. SCHWAB:

Q. Investigator Hamlin, you testified before. What I'd like to ask about you now is after you went to Giles County.

[843] A. Yes, sir.

Q. On the evening and the early morning hours of December the 6th. When you got there did you speak with Investigator Price of their Sheriff's office?

A. Yes, I did.

Q. And did you have occasion to speak with one, Mark Lilly, on that time?

A. Yes, I did.

Q. And when and where did you talk to him?

A. At the Sheriff's Office in Giles County.

Q. Do you recall what time it was or approximately?

A. Yes, sir. As I recall, it was around 2:30 something when I talked to him.

Q. And you had him sign a Miranda Waiver, is that correct?

A. Yes, I did.

Q. Did you use a tape recorder with the interview?

A. Yes, sir, I did.

Q. And did you have that tape transcribed?

[844] A. Yes, sir, I did.

Q. And you've seen a copy of the transcription?

A. Yes, sir, I did.

Q. Now, we know this isn't Montgomery County's equipment. Did you hear the tape on this machine today?

A. Yes, sir, I did.

Q. And did you compare it against the transcript at that time?

A. Yes, I did.

Q. And would you tell the Court whether or not the transcript is complete at this point?

A. It's complete. It's a couple of inaudibles in there that the secretary couldn't get.

Q. So, there's some things that may be audible on the tape that were not on the machine of Giles County that you couldn't get in Montgomery County?

A. Yes, sir.

Q. I'd like you to look at this. Is that the transcript that was prepared by the secretary for [845] Montgomery County?

A. Yes, it is.

Q. And except for what you've noticed today about some inaudibles, may be a little clearer, is that correct?

A. Yes, sir.

Q. And you have the tape here?

A. Yes, I do.

Q. All right.

MR. SCHWAB: Your Honor, we have discussed this. I understand and we acknowledge that there may be some omissions from the transcript, but again the transcript in a guide. There are some matters that were of low volume that may be more discernible on this equipment than was previously available, but again the transcripts will be offered to the Court and the jury to be used for following along and again it is the tape that is the evidence, not the transcript itself.

THE COURT: All right, sir.

MR. TUCK: Your Honor, Mr. Schwab and I and the Court discussed this matter and we may be able [846] to hear the inaudibles that are able to be heard and obviously those may not be on the transcript because Montgomery County's equipment is not as advanced apparently as the equipment over in Giles County and we don't have any objections to those inaudibles, but we do have an ongoing objection that's continuing.

THE COURT: All right, sir. I understand that. Thank you, Mr. Tuck. Go ahead and distribute.

MR. SCHWAB: There are fifteen pages. I believe some of the copies are faint. I apologize for that. You can take that up with the Board of Supervisors. There's a copy also for the Clerk and for the Court Reporter again to be placed with the record, but not to be introduced in evidence.

MR. SCHWAB: If everyone's ready –

THE COURT: Does everyone have their copy? All right, sir, go ahead.

MR. SCHWAB: Investigator, will you turn on the tape, please.

TAPE PLAYED INTO RECORD – INTERVIEW ON DECEMBER [847] 6, 1995, AT 2:30 A.M., WITH INVESTIGATOR BOB FLEET, LIEUTENANT R. L. HAMLIN WITH MARK LILLY

MR. SCHWAB: Investigator, can you turn it up just a little bit perhaps?

MR. SCHWAB: Continue your questions.

Q. Yes, not about the, that was the only time or the last time you talked to Mark Lilly?

A. Yes.

Q. Now, I believe this last week or the week, sometime in the month of October, you went to the Giles County Jail, is that correct?

A. Yes, I did.

Q. And that's when you got a blood sample from Gary Barker?

A. Yes, Sir.

Q. Did you also measure Gary Barker?

A. Yes, sir, I did.

Q. What was his height?

A. Gary Barker's height, overall height is 5 foot 7¼ inches.

Q. All right. And height to his shoulder?

[848] A. He is 4 foot, 8 inches.

Q. And Mark Lilly was also present –

A. Yes.

Q. Or was present in the same jail?

A. Yes, sir, he was.

Q. And did you measure him?

A. Yes, sir, I did.

Q. And what was his height?

A. Mark Lilly's height overall is 6 foot, 2 inches.

Q. And to his shoulder?

A. 5 foot, 4 inches.

Q. Thank you. That's all the questions I have.

THE COURT: Thank you, Mr. Schwab. Gentlemen.

MR. TUCK: If the Court would direct one of the bailiffs to collect the transcripts.

THE COURT: All right, sir.

MR. TUCK: I'd forgotten about that. Thank you, Mr. Jenkins.

* * *

(6)

Supreme Court, U.S.
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CLERK

No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

JOINT APPENDIX
VOLUME II, Pages 298 to 616

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LT. R.L. HAMLIN: THIS IS LT. RON HAMLIN, MONTGOMERY COUNTY SHERIFF'S OFFICE. TODAY'S DATE IS DECEMBER 6, 1995. TIME IS 2:00 A.M. PRESENT DURING THIS INTERVIEW WILL BE INVESTIGATOR BOB FLEET, MONTGOMERY COUNTY SHERIFF'S OFFICE. WE'LL BE TALKING TO MARK LILLY, WHO LIVES IN RINER. FIRST OFF, I'M GOING TO ADVISE MR. LILLY OF HIS MIRANDA RIGHTS. YOU HAVE THE RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AS EVIDENCE IN A COURT OF LAW. YOU HAVE THE RIGHT TO TALK TO A LAWYER, AND HAVE HIM PRESENT WITH YOU WHILE YOU'RE BEING QUESTIONED. IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING, IF YOU WISH. IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. DO YOU UNDERSTAND WHAT I JUST TOLD YOU?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: YOU DO UNDERSTAND?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY, WOULD YOU SIGN RIGHT HERE, PLEASE?

(PAUSE)

LT. R.L. HAMLIN: OKAY, MARK, WE UNDERSTAND SOME THINGS HAPPENED TODAY. WELL, IT'S PASSED, IT'S YESTERDAY NOW, ON 12/5. WE NEED

TO TALK TO YOU ABOUT WHAT'S HAPPENED YESTERDAY AND LED UP TO WHY WHAT WE'RE HERE RIGHT NOW AT 2:30 IN THE MORNING, OKAY?

MARK A. LILLY: ALL RIGHT.

LT. R.L. HAMLIN: IF YOU WOULD, LET'S TALK ABOUT HOW DID YESTERDAY START OFF?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: SIR?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: YOU WERE DRUNK YESTERDAY?

MARK A. LILLY: YEAH. DRUNK AS I EVER BEEN. WE PARTIED ALL NIGHT THE NIGHT BEFORE.

LT. R.L. HAMLIN: WHAT'S YOUR MIDDLE NAME?

MARK A. LILLY: ANTHONY.

LT. R.L. HAMLIN: OKAY, WHO WERE YOU WITH YESTERDAY?

MARK A. LILLY: BEN AND GARY BARKER. BEN LILLY AND GARY BARKER.

LT. R.L. HAMLIN: WHERE DID YALL GET TOGETHER AT?

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: COME HERE AND SPEAK UP. I'VE GOT TO GET THIS.

MARK A. LILLY: BEN COME OVER TO THE TRAILER ABOUT 9 OR 10 IN THE MORNING. WE WAS STILL IN THE BED.

LT. R.L. HAMLIN: BEN CAME TO YALL'S TRAILER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: "YALL" IS BEN?

MARK A. LILLY: DO WHAT?

LT. R.L. HAMLIN: BEN IS YOUR BROTHER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHERE'S THAT AT, WHERE DO YOU LIVE AT?

MARK A. LILLY: HOLLY COURT TRAILER PARK.

LT. R.L. HAMLIN: BEN LIVE THERE, OR IS THAT HIS PLACE OR YOURS?

MARK A. LILLY: NAH, IT'S JUST A PLACE ME AND GARY GO PARTYING. (INAUDIBLE)

LT. R.L. HAMLIN: HANG OUT SPOT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THAT'S YOU AND UH, BEN. WHAT DID YALL DO FROM THERE?

MARK A. LILLY: STARTED DRINKING.

LT. R.L. HAMLIN: STARTED DRINKING?

MARK A. LILLY: YEAH. WE ALWAYS GET SOMETHING TO DRINK.

LT. R.L. HAMLIN: THEN WHAT ELSE DID YOU GET IN TO?

MARK A. LILLY: WENT TO FLOYD COUNTY.

LT. R.L. HAMLIN: ABOUT WHAT TIME?

MARK A. LILLY: IT WAS DARK.

LT. R.L. HAMLIN: IT WAS DARK?

MARK A. LILLY: YEAH. IT WAS, DRANK BEER, LIQUOR ALL DAY.

LT. R.L. HAMLIN: ABOUT WHAT TIME DID YOU GO TO FLOYD THEN, ABOUT FIVE? OR A LITTLE AFTER, FIVE-THIRTY?

MARK A. LILLY: YEAH, GIVE OR TAKE.

LT. R.L. HAMLIN: ALL RIGHT, WHAT DID YOU GO TO FLOYD FOR?

MARK A. LILLY: WE BROKE INTO A PLACE.

LT. R.L. HAMLIN: BREAK INTO A PLACE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHOSE PLACE WAS IT?

MARK A. LILLY: I DON'T KNOW. I DON'T, I BARELY EVEN REMEMBER IT.

LT. R.L. HAMLIN: WAS IT A HOUSE OR A STORE?

MARK A. LILLY: A HOUSE.

LT. R.L. HAMLIN: ALL RIGHT, HOW DID YOU GET OVER TO FLOYD?

MARK A. LILLY: UH, THE COUGAR, MERCURY COUGAR.

LT. R.L. HAMLIN: WHOSE CAR IS THAT?

MARK A. LILLY: IT'S BEN'S.

LT. R.L. HAMLIN: WHO WAS DRIVING?

MARK A. LILLY: UH, I DON'T KNOW.

LT. R.L. HAMLIN: YOU DON'T REMEMBER WHO WAS DRIVING?

MARK A. LILLY: NO, I ALWAYS RIDE IN THE BACK.

LT. R.L. HAMLIN: DID THAT CAR BELONG TO BEN?

MARK A. LILLY: UH-HUH.

LT. R.L. HAMLIN: YOU REMEMBER BREAKING INTO THE HOUSE?

MARK A. LILLY: NOT REALLY, NO.

LT. R.L. HAMLIN: DO YOU KNOW WHO BROKE IN? DID YOU GO INSIDE THE HOUSE?

MARK A. LILLY: UH, I GUESS.

LT. R.L. HAMLIN: YOU WENT INSIDE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL OF YOU GO IN?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT DID YOU TAKE FROM THE HOUSE?

MARK A. LILLY: LIQUOR.

LT. R.L. HAMLIN: WHAT ELSE?

MARK A. LILLY: GUNS.

LT. R.L. HAMLIN: GUNS? WHAT KIND OF GUNS?

MARK A. LILLY: UH, THREE. A PISTOL AND SOME RIFLES.

LT. R.L. HAMLIN: TOOK ONE PISTOL? AND A RIFLE?

INV. R.F. FLEET: TWO RIFLES.

LT. R.L. HAMLIN: TWO RIFLES? THAT IT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND LIQUOR.

MARK A. LILLY: AND LIQUOR.

INV. R.F. FLEET: ANYTHING ELSE YOU CAN THINK OF?

MARK A. LILLY: NOT THAT I CAN THINK OF. I WAS SO DRUNK. I WAS DRUNK WHEN YOU BROUGHT ME IN HERE AT 1:30 THIS MORNING.

INV. R.F. FLEET: HOW YOU FEEL NOW?

LT. R.L. HAMLIN: WAS IT. . . .

MARK A. LILLY: I FEEL ALL RIGHT.

INV. R.F. FLEET: YOU'RE ALL RIGHT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU KNOW WHERE YOU'RE AT?

MARK A. LILLY: YEAH, I'M IN JAIL.

INV. R.F. FLEET: WHERE AT?

MARK A. LILLY: IN GILES COUNTY.

LT. R.L. HAMLIN: OKAY, ONCE YOU LEFT FLOYD WHERE DID YOU GO?

MARK A. LILLY: I DON'T EVEN REMEMBER. (INAUDIBLE)

LT. R.L. HAMLIN: YOU CAME STRAIGHT. . . . YOU DON'T REMEMBER COMING BACK FROM FLOYD? WHAT DO YOU REMEMBER NEXT? COME OVER HERE AND TALK.

MARK A. LILLY: DRUNK AS SHIT. THAT'S ALL I REMEMBER.

INV. R.F. FLEET: TELL US ABOUT WHAT HAPPENED AFTER YOU LEFT FLOYD, MARK.

LT. R.L. HAMLIN: WHEN YOU COME BACK TO MONTGOMERY COUNTY, WHAT DO YOU REMEMBER?

MARK A. LILLY: WE WENT BACK TO THE TRAILER AND DRANK SOME MORE LIQUOR.

INV. R.F. FLEET: THEN WHERE DID YOU GO?

MARK A. LILLY: UH, WENT TO GILES COUNTY FOR SOMETHING.

INV. R.F. FLEET: OKAY, AND WHAT HAPPENED THEN?

MARK A. LILLY: WE WERE IN SOMEWHERE OVER IN BLACKSBURG, THE CAR BROKE DOWN AND THE DUDE GOT ANOTHER CAR.

LT. R.L. HAMLIN: (INAUDIBLE)

INV. R.F. FLEET: TELL US ABOUT HOW THE DUDE GOT ANOTHER CAR.

MARK A. LILLY: PULLED OUT A GUN.

INV. R.F. FLEET: WHO WAS THE DUDE?

MARK A. LILLY: MY BROTHER.

LT. R.L. HAMLIN: ALL RIGHT, WHERE DID THIS HAPPEN AT?

MARK A. LILLY: STORE NEAR PRICE'S FORK (INAUDIBLE)

LT. R.L. HAMLIN: AND HOW COME HIM TO DO THAT?

MARK A. LILLY: DIDN'T WANT TO WALK I GUESS. (INAUDIBLE)

LT. R.L. HAMLIN: WHAT DID, WHAT HAPPENED TO THE COUGAR?

MARK A. LILLY: IT BROKE DOWN, MAN, THE BATTERY WENT DEAD. OH, YEAH, THE FUCKING TRANSMISSION WENT OUT.

LT. R.L. HAMLIN: ALL RIGHT, WHEN BEN, WHEN BEN PULLED THE GUN ON THE DUDE, WHERE WERE YOU AT?

MARK A. LILLY: STILL IN THE COUGAR.

LT. R.L. HAMLIN: YOU WERE STILL IN THE COUGAR? WHERE WAS GARY BARKER AT?

MARK A. LILLY: HE WAS STANDING BESIDE THE COUGAR.

LT. R.L. HAMLIN: YOU AND GARY WERE AT THE COUGAR?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL RIGHT, WHAT HAPPENED THEN? WHAT DID YALL SEE HAPPEN?

MARK A. LILLY: WELL, BEN JUST TOLD US TO COME ON.

LT. R.L. HAMLIN: SO YALL WENT OVER THERE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: BEN TOLD YALL TO COME ON?

MARK A. LILLY: YEAH. WE WAS DRUNK MAN.

INV. R.F. FLEET: WHAT HAPPENED TO THE DUDE THAT OWNED THE CAR?

MARK A. LILLY: BEN SHOT HIM.

LT. R.L. HAMLIN: NO . . .

INV. R.F. FLEET: NOT YET.

LT. R.L. HAMLIN: WE'RE TALKING ABOUT AT THE STORE. NOW.

MARK A. LILLY: OH.

LT. R.L. HAMLIN: AT THE STORE WHEN BEN TOLD YALL TO COME ON, WHAT, WHAT HAPPENED TO THE BOY YOU TOOK THE CAR? THAT WAS DRIVING THE CAR, WHAT HAPPENED TO HIM?

INV. R.F. FLEET: I KNOW IT'S TOUGH, WE'RE JUST TRYING TO FOLLOW WHAT HAPPENED AT EACH PLACE. AND WE KNOW WHAT HAPPENED TO THE BOY.

MARK A. LILLY: YEAH. YEAH, MAN, SOMETHING ELSE, TOO. I'M GOING TO BE GETTING ALL THESE CHARGES AND THAT'S MY BROTHER I'M TELLING ON.

INV. R.F. FLEET: I KNOW THAT.

LT. R.L. HAMLIN: YEP.

INV. R.F. FLEET: YOU DIDN'T PULL THE TRIGGER, THOUGH.

MARK A. LILLY: I DIDN'T.

INV. R.F. FLEET: YOU DON'T NEED TO TAKE THE WRAP.

LT. R.L. HAMLIN: THAT'S RIGHT.

MARK A. LILLY: I KNOW, THEY'RE GONNA SEND ME TO THE PENITENTIARY ANYWAY (INAUDIBLE) GRAND JURY (INAUDIBLE) THEY GOT ME FOR ARMED ROBBERY. I KNOW YALL ARE GONNA BRING UP SOME KIND OF MURDER CHARGE.

INV. R.F. FLEET: THAT'S WHY WE'RE TALKING TO YOU. WE'RE TRYING TO HELP YOU RIGHT NOW, TRYING TO GET, YOU KNOW, TO FIND OUT WHO SHOT THIS BOY. NOW WE KNOW THAT YALL WERE THERE AND BEN PULLED THE GUN ON THIS GUY. AND YALL GOT IN THE CAR AND WENT DOWN TOWARDS MCCOY.

LT. R.L. HAMLIN: DID YOU, WHO MADE THE BOY GET IN THE CAR? DID YOU DO IT?

MARK A. LILLY: NO.

INV. R.F. FLEET: WHO DID?

LT. R.L. HAMLIN: WHO PUT THE GUN ON THE BOY AND MADE HIM GET IN THE CAR?

INV. R.F. FLEET: TELL THE TRUTH, MARK, FOR GOODNESS SAKES. WE'RE THE ONLY PEOPLE THAT ARE GOING TO HEAR RIGHT NOW AND THE ONLY PEOPLE GOING TO DO ANYTHING TO HELP YOU, NOW TELL THE TRUTH.

MARK A. LILLY: IT WAS BEN.

LT. R.L. HAMLIN: WHAT DID BEN TELL HIM?

MARK A. LILLY: I DON'T REALLY KNOW.

INV. R.F. FLEET: WHAT KIND OF GUN DID BEN HAVE?

MARK A. LILLY: PISTOL.

LT. R.L. HAMLIN: POINTED THE PISTOL AT HIM? WHAT DID THEY, WHERE WERE THE RIFLE AND SHOTGUN AT THAT TIME?

MARK A. LILLY: I DON'T EVEN KNOW. I WASN'T WORRIED ABOUT NO GUN I WAS DRUNK, THE ONLY THING I KEEP UP WITH MAN IS THE BEER.

INV. R.F. FLEET: THAT'S A GOOD THING TO KEEP UP WITH.

MARK A. LILLY: I AIN'T TRYING TO BE SMART. I DRINK ALL THE TIME.

LT. R.L. HAMLIN: ALL RIGHT, SO YALL LEFT THE STORE. THEN . . .

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: BACK TOWARDS. . . . PRICE'S FORK?

MARK A. LILLY: I DON'T KNOW. LET ME ASK YALL A QUESTION, WHERE WAS THE BODY FOUND?

INV. R.F. FLEET: WHERE WAS WHAT?

MARK A. LILLY: THE BODY FOUND?

LT. R.L. HAMLIN: WE FOUND HIM IN WHITE-THORNE.

INV. R.F. FLEET: WHITETHORNE.

MARK A. LILLY: WHITETHORNE?

LT. R.L. HAMLIN: OUT PRICE'S FORK.

INV. R.F. FLEET: YOU KNOW WHERE THE BOAT LANDING IS AT WHITETHORNE?

MARK A. LILLY: I DON'T KNOW.

INV. R.F. FLEET: YOU KNOW WHERE THE RAIL-ROAD TRACKS: REMEMBER RAILROAD TRACKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: IS THAT WHERE YALL WENT? TOWARDS THE RAILROAD TRACKS?

MARK A. LILLY: BUDDY, I CAN'T EVEN THINK. I DON'T KNOW.

LT. R.L. HAMLIN: SO YALL, WHERE WAS THE GUY SEATED AT WHEN YOU LEFT?

MARK A. LILLY: IN THE BACK SEAT BESIDE THE WINDOW.

LT. R.L. HAMLIN: WHAT WAS HE SAYING?

MARK A. LILLY: NOTHING.

INV. R.F. FLEET: WAS HE SCARED?

MARK A. LILLY: HE DIDN'T REALLY ACT IT, YOU KNOW.

LT. R.L. HAMLIN: WERE YALL HAVING A CONVER-SATION, WAS BEN AND UH, MARK, NOT MARK, BEN AND GARY TALKING? WERE YOU TALKING?

MARK A. LILLY: NO, NOBODY TALKED.

LT. R.L. HAMLIN: NOBODY SAID A WORD? AND BEN DROVE THE CAR?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: OKAY, SO YOU END UP IN AN ISOLATED SPOT OUT IN THE COUNTY SOMEWHERE, THAT'S ALL YOU REMEMBER, RIGHT? YOU WITH ME? YES OR NO?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: SO YOU GO TO AN ISOLATED SEC-TION OF THE COUNTY, WHAT DO YOU REMEMBER ABOUT THE ISOLATED SECTION THAT WE'RE TALK-ING ABOUT? WHEN YALL STOPPED WITH THE GUY?

MARK A. LILLY: BIG OLD TANKS.

LT. R.L. HAMLIN: BIG TANKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT ELSE DO YOU RECALL?

MARK A. LILLY: THAT'S ABOUT IT.

LT. R.L. HAMLIN: REAL DARK?

MARK A. LILLY: YEAH, IT WAS DARK.

LT. R.L. HAMLIN: YOU REMEMBER RAILROAD TRACKS, BRIDGES?

MARK A. LILLY: SOMETHING LIKE THAT.

LT. R.L. HAMLIN: OH, WELL, WE'RE TRYING TO HELP YOU, WE'RE NOT TRYING TO LEAD YOU INTO ANYTHING.

MARK A. LILLY: I WASN'T DRUNK ENOUGH, YOU KNOW, I KNOW THAT I DIDN'T PULL NO DAMN TRIGGER. (INAUDIBLE)

LT. R.L. HAMLIN: OKAY.

INV. R.F. FLEET: OKAY, THAT'S GOOD. THAT'S GOOD.

LT. R.L. HAMLIN: ALL RIGHT . . .

INV. R.F. FLEET: YOU REMEMBER RAILROAD TRACKS? YOU SAID THAT RINGS A BELL.

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: YOU REMEMBER A PILE OF JUNK OR ANYTHING LIKE THAT, WHAT ELSE?

MARK A. LILLY: I WASN'T PAYING ATTENTION.

INV. R.F. FLEET: A FIELD? A BIG, OLE CORN FIELD, LIKE?

LT. R.L. HAMLIN: YEAH, A BID, OLE FIELD THERE BEHIND IT.

INV. R.F. FLEET: IT'S SORT OF ISOLATED, RIGHT? WASN'T ANYTHING REALLY AROUND? JUST LIKE A BIG GRAVEL LOT, WASN'T IT? IS THAT WHAT IT WAS? REMEMBER THAT?

LT. R.L. HAMLIN: DID YOU GET OUT OF THE CAR?

MARK A. LILLY: I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU NEVER DID GET OUT OF THE CAR?

INV. R.F. FLEET: WHERE WERE YOU SITTING?

MARK A. LILLY: I WAS SITTING IN THE PASSENGER. BEHIND THE PASSENGER SEAT. I NEVER GOT OUT OF THE CAR.

LT. R.L. HAMLIN: DID GARY GET OUT OF THE CAR?

MARK A. LILLY: NUH-HUH.

LT. R.L. HAMLIN: THE ONLY TWO PEOPLE THAT GOT OUT WAS BEN . . .

MARK A. LILLY: AND THE DUDE.

LT. R.L. HAMLIN: WHAT DID, HOW DID YALL GET HIM OUT? DID BEN JUST SAY COME ON, GET OUT?

MARK A. LILLY: YEAH, JUST LIKE THAT.

LT. R.L. HAMLIN: AND THE GUY GOT OUT.

MARK A. LILLY: YEAH.

INV. R.F. FLEET: AND THEN WHAT?

MARK A. LILLY: AND THAT;S WHEN BEN SHOT HIM.

LT. R.L. HAMLIN: WHAT KIND OF WEAPON DID BEN HAVE THEN?

MARK A. LILLY: THE PISTOL.

INV. R.F. FLEET: (INAUDIBLE) WHAT DO YOU MEAN?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: AND WHO HAD THE GUN?

MARK A. LILLY: BEN.

LT. R.L. HAMLIN: BEN?

INV. R.F. FLEET: AND WHAT KIND OF GUN WAS IT?

MARK A. LILLY: .3S.

INV. R.F. FLEET: AND WHERE WERE YOU SITTING AT, OR WHERE WERE YOU AT?

MARK A. LILLY: I WAS STILL IN THE CAR.

INV. R.F. FLEET: DID YOU SEE THE SHOT?

MARK A. LILLY: I SAW HIM FIRE.

INV. R.F. FLEET: DID YOU KNOW WHAT HAPPENED?

MARK A. LILLY: YEAH. I DIDN'T KNOW WHAT TO THINK, MAN.

LT. R.L. HAMLIN: WHEN, AT WHAT POINT DID YOU TAKE THE CLOTHES OFF OF THE GUY? DO YOU REMEMBER THAT?

MARK A. LILLY: I GUESS THEY TOOK THEM OFF WHEN THEY WAS OUTSIDE FUCKING AROUND.

LT. R.L. HAMLIN: BEN TELL HIM TO TAKE HIS CLOTHES OFF, YOU REMEMBER THAT?

MARK A. LILLY: I COULDN'T HEAR WHAT THEY WERE SAYING.

LT. R.L. HAMLIN: DID YOU SEE THE GUY TAKING HIS CLOTHES OFF THOUGH? DID YOU SEE ANYTHING?

MARK A. LILLY: I SEEN THE DUDE TAKING HIS SHIRT OFF, SHOES.

LT. R.L. HAMLIN: THE DUDE WAS TAKING HIS SHIRT AND PANTS AND STUFF OFF? AND WHAT WAS BEN SAYING?

MARK A. LILLY: I DON'T KNOW. YOU KNOW WE HAD THE MUSIC BLAIRING [SIC]. IT WAS PRETTY COLD OUTSIDE, THE WINDOWS WERE UP.

LT. R.L. HAMLIN: ALL RIGHT. DID BEN GET BACK IN THE CAR. WAS HE GOING TO DRIVE OFF AND LEAVE THE GUY THERE TO WALK AWAY? DID BEN TELL HIM THAT HE WAS GOING TO LEAVE HIM THERE OR DID THEY JUST STAY OUTSIDE THE WHOLE TIME AND THEN BANG, BANG? AND THAT WAS IT?

MARK A. LILLY: THAT'S PRETTY MUCH IT.

LT. R.L. HAMLIN: BEN NEVER GOT BACK IN THE CAR UNTIL AFTER THE SHOOTING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: HE DIDN'T GET IN THE CAR AND START TO DIVE OFF AND SAY 'OH, I FORGOT, HE

KNOWS ME NOW, HE'S SEEN ME' AND STOP THE CAR AND GOT OUT?

MARK A. LILLY: NO, MAN.

LT. R.L. HAMLIN: THE WHOLE TIME, WHEN BEN STOPPED THE CAR AND GOT THE GUY OUT, BEN NEVER GOT BACK IN THE CAR? HE SHOT HIM BEFORE HE GOT BACK IN WITH YOU, IS THAT CORRECT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY. DID YALL LEAVE THERE PRETTY QUICK? DID YOU SPIN GRAVEL AND TAKE OFF?

MARK A. LILLY: WE LEFT TOWN PRETTY QUICK, YEAH.

LT. R.L. HAMLIN: HOW MANY TIMES DO YOU THINK HE SHOT HIM? COULD YOU HEAR SHOTS?

MARK A. LILLY: A COUPLE.

LT. R.L. HAMLIN: A COUPLE OF SHOTS.

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: THEN YALL LEFT MCCOY. WHICH WAY DID YOU GO THEN? YOU COME TO GILES.

MARK A. LILLY: WE WENT TO GILES, WE WAS GOING OUT SOME BACK ROAD.

LT. R.L. HAMLIN: OUT THE BACK ROAD?

MARK A. LILLY: YEAH, THROUGH THAT LONG, STRAIGHT STRETCH AROUND THE CURVE.

LT. R.L. HAMLIN: OKAY, NOW, AFTER SEEING SOMETHING LIKE THAT, YOU AND GARY, AFTER THIS HAPPENED, WHAT WAS SAID AFTER BEN GOT BACK IN THE CAR? WHAT DID YALL TALK ABOUT?

MARK A. LILLY: NOTHING, I COULDN'T FIGURE IT OUT. I LIKE TO SHIT IN MY PANTS.

LT. R.L. HAMLIN: YALL DIDN'T TALK ABOUT ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: DID BEN SAY ANYTHING ABOUT SHOOTING HIM? BEN SAY 'WELL, I CAPPED HIM'? DID HE SAY ANYTHING?

MARK A. LILLY: WE WAS ALL STUNNED.

LT. R.L. HAMLIN: BEN WASN'T STUNNED WAS HE?

MARK A. LILLY: I DON'T KNOW IF HE WAS OR NOT. HE DIDN'T SAY MUCH. I KNOW GARY WAS.

LT. R.L. HAMLIN: YEAH.

MARK A. LILLY: I KNOW HE AIN'T SEEN NOTHING LIKE AND I HADN'T EITHER.

LT. R.L. HAMLIN: YALL HAVE NEVER SEEN NOTHING LIKE THAT HAD YOU?

MARK A. LILLY: NO.

INV. R.F. FLEET: YALL DIDN'T TALK AND BEN DIDN'T SAY ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: YOU BOUND TO HAVE TALKED ABOUT SOMETHING, MARK.

INV. R.F. FLEET: HE SHOT THIS GUY AND NEVER SAID A WORD?

MARK A. LILLY: NOT THAT I KNOW OF. MAINLY TALKED AMONG EACH OTHER.

LT. R.L. HAMLIN: BEN WAS DOING THE DRIVING STILL YET?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: (INAUDIBLE)

LT. R.L. HAMLIN: SO YOU COME TO GILES COUNTY. WHO COME UP WITH THE IDEA LET'S UH, WE KNOW YOU ROBBED A COUPLE OF STORES OVER HERE, RIGHT?

INV. R.F. FLEET: STUCK UP A COUPLE OF PLACES, REMEMBER THAT?

MARK A. LILLY: I WAS WITH THE PEOPLE THAT DID IT.

INV. R.F. FLEET: REMEMBER THAT?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: GARY AND BEN.

LT. R.L. HAMLIN: YEAH, OKAY. WHAT, WHEN WAS THAT DECISION MADE? WAS THAT MADE ON THE WAY TO GILES? LET'S GO OVER TO GILES? WERE YALL GOING TO ROB STORES AND LEAVE THIS AREA OR. . . . ?

MARK A. LILLY: I DON'T KNOW, MAN, IT JUST ALL HAPPENED, LIKE THAT, BAM, BAM. THE ROBBERY JUST HAPPENED LIKE THAT.

INV. R.F. FLEET: WHOSE IDEA WAS THAT?

LT. R.L. HAMLIN: YEAH, WHO COME UP WITH THAT?

MARK A. LILLY: I DON'T KNOW.

LT. R.L. HAMLIN: DID YALL NEED SOME MONEY?

MARK A. LILLY: WE WAS BROKE.

LT. R.L. HAMLIN: YOU WERE BROKE.

MARK A. LILLY: YEAH. (INAUDIBLE)

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OFF OF THE GUY THAT YOU LEFT OVER THERE IN MONTGOMERY? DID HE HAVE ANY MONEY ON HIM?

MARK A. LILLY: I DON'T KNOW THAT.

LT. R.L. HAMLIN: ALL YOU KNOW IS YOU TOOK THE CLOTHES. TAKE HIS WATCH OR ANYTHING?

MARK A. LILLY: I DON'T KNOW NOTHING ABOUT THAT SHIT, MAN. I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU DON'T KNOW. OKAY, SO YOU COME TO GILES AND THEN EVERYTHING JUST CLICKED AND A COUPLE OF PLACES OVER HERE.

MARK A. LILLY: YEAH, IT JUST ALL HAPPENED QUICK. THEY WAS DRUNKER THAN HELL, TOO.

LT. R.L. HAMLIN: SO, THEN THE NEXT THING YOU KNOW YOU'RE CAUGHT AND BROUGHT INTO THE SHERIFF'S OFFICE?

MARK A. LILLY: YEAH. I WAS WALKING UP 460. NEVER SEEN SO GODDAMN MANY LAW IN MY LIFE.

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OUT OF THESE STORES YOU WERE ROBBING OVER HER [sic]?

MARK A. LILLY: A FEW DOLLARS. BOTH THEM MOTHER-FUCKERS ARE CRAZY.

LT. R.L. HAMLIN: WHO IS?

MARK A. LILLY: BEN AND GARY. ALREADY HAD ENOUGH CHARGES ON THEM AS IT WAS.

LT. R.L. HAMLIN: SO AFTER YOU ROBBED THIS SECOND PLACE THE NEXT THING YOU KNOW IS YOU WERE APPREHENDED BY GILES COUNTY, IS THAT RIGHT?

MARK A. LILLY: YEAH (INAUDIBLE)

LT. R.L. HAMLIN: YOU WERE DRUNK AND TRYING TO RUN AWAY AND THEY CAUGHT YOU, HUH?

MARK A. LILLY: THE DIDN'T CATCH ME RUNNING.

LT. R.L. HAMLIN: ANYTHING ELSE?

INV. R.F. FLEET: I WANT TO GO BACK, MARK. TO RIGHT AFTER THE SHOTS WERE FIRED. YOU WERE IN THE CAR, BEHIND THE PASSENGER SEAT. WHO WAS IN THE FRONT SEAT?

MARK A. LILLY: GARY.

INV. R.F. FLEET: YALL HEARD AND SAW A COUPLE OF SHOTS. MUSIC WAS PLAYING. BEN COMES AND GETS BACK IN THE CAR AND YALL TAKE OFF. GARY, UH, GARY DIDN'T SAY ANYTHING?

MARK A. LILLY: NO, ME AND GARY SAYS 'GODDAMN', MOTHER-FUCKER SHOT HIM.

LT. R.L. HAMLIN: SAID WHAT?

MARK A. LILLY: SAID 'GODDAMN.'

LT. R.L. HAMLIN: BOTH OF YOU DID?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THEN BEN JUMPS IN AND DOWN THE ROAD YOU TAKE OFF.

INV. R.F. FLEET: AND WHAT DID BEN SAY?

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE'? 'HE'S DEAD'?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: HE FELT LIKE HE WAS DEAD? (INAUDIBLE)

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE AND I THINK HE'S DEAD'? YOU REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU DO REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: ANYTHING ELSE?

LT. R.L. HAMLIN: OTHER THAN BEING SCARED AS HELL, HUH?

MARK A. LILLY: YEAH, THAT'S THE TRUTH, MAN.

LT. R.L. HAMLIN: I KNOW, I CAN TELL LOOKING AT YOU, YOU'RE SCARED TO DEATH.

MARK A. LILLY: SEE SOMEBODY BLOWN AWAY, GODDAMN.

INV. R.F. FLEET: I KNOW.

MARK A. LILLY: I AIN'T NO VIOLENT PERSON. I'VE NEVER BEEN ARRESTED FOR VIOLENT CRIMES, YOU KNOW.

INV. R.F. FLEET: ALL RIGHT, THAT'S THE END.

LT. R.L. HAMLIN: OKAY, THIS WILL BE THE END OF THE INTERVIEW, THE TIME IS 2:53 A.M.

END

Testimony of Ron Hamlim/Cross

* * *

[849] CROSS-EXAMINATION

BY MR. TUCK:

Q. Mr. Hamlin, I'm going to ask you some questions and if you don't know, please feel free to refresh your collection with the transcript. Do you remember asking, you or Investigator Fleet, about what or whose place it was over in Floyd that they broke into?

A. Yes.

Q. And do you recall what answer, looking at Page 3, top of Page 3, what Mark Lilly said?

A. Okay. Mark Lilly said, I don't know.

Q. Okay. Now, we're probably going to be going through this a lot, so you might want to go ahead and pull out your, your copy. We will be going over the next few pages. Do you recall during the whole period of the transcript, did he ever mention that he went over to Radford at any point in time?

A. Did who say that?

Q. Did, did Mark Lilly ever say, hey, we went, after we broke into Floyd we went over to Radford?

A. I don't recall that he did.

[850] Q. Do you need to review it again to see if he did? I, I didn't hear it, but I –

A. I don't recall that, Mr. Tuck.

Q. Now, did he indicate how the car broke down on Page 5, do you recall him asking what happened to the Cougar?

A. Yes.

Q. And what did he initially say?

A. Let's see. Where is that at?

Q. Bottom of page, I think this is five. My copies are a little bit faded, but –

A. All right. He said he broke down and the battery went dead, and, oh, yes, the fucking transmission went out.

Q. Okay. And I believe you asked him or if you recall, do you remember asking him where they were at when Ben Lilly pulled the gun out supposedly?

A. Yes, yes.

Q. And where did they indicate they were at, if you recall?

A. They indicated they were in the Hethwood [851] Section of Price's Fork Road at a convenience store.

Q. Okay. Did they indicate where in that vicinity? Were they in the car, or were they in the trees? Where did they, where did Mark Lilly indicate they were at when Ben Lilly allegedly pulled the gun?

A. I think Mark stated he was probably still in the car.

Q. And where did he indicate that Gary was, if you recall? And I'm referring to the bottom of Page 5, if that's helpful for you.

A. He said he was standing up beside the Cougar.

Q. He indicated, or do you recall asking him about where was the shotgun and the rifle and those items?

A. Yes.

Q. On Page 7. About half way down and going toward the bottom half. And do you recall what his answer was?

A. Let me find it.

Q. Maybe I can help you point this out.

[852] A. Where at? I keep missing it. I can't see it.

Q. That's all right.

A. All right. He pointed a pistol at him. Us see, what did I say, where was the rifle and the shotgun at the time? Lilly stated, I don't even know. I wasn't worrying about no gun. I was drunk. The only thing I could keep up with was the beer.

Q. Now, you had, you interviewed him after Gary Price, is that correct? Gary Price interviewed Mark Lilly first –

A. Yes, that's correct.

Q. Okay. And were you present during that questioning an well and when you came in do they have like a little mirror that you was behind or anything?

A. No. I wasn't present.

Q. Okay. Now, after the abduction takes place over in the Price's Fork area, do you recall asking Mr. Barker,

or Mr. Lilly, if you heard any conversations or talking in between from the Hethwood Express to the Whitethorne Landing?

[853] A. Yes, I recall asking him that.

Q. And looking towards, I believe it's Page 8, but again mine is a little bit faded, ah, did you indicate what his answer was? Do you recall?

A. I think he said that, ah, there wasn't any talking.

Q. Did he also indicate throughout this questioning that he never got out of the car and that he was in the back passenger seat belt the entire time, is that correct?

A. Yes.

Q. Did he ever indicate throughout any of these proceedings that he or Mark Lilly had asked the victim to hide his face or close his eyes or anything along those lines?

A. No, I don't recall Mark saying that.

Q. I believe you asked him whether Ben got back into the car at any point in time before the shooting took place, do you recall what his answer was?

A. He stated Ben never got back in the car once he had taken Mr. Defilippis out of the car.

[854] Q. Now, do you recall asking him and this is on Page 12, now, I believe later on he may or may not give you a different response, after, this is after the murder has taken place, I believe you asked him whether he talked about anything, in that correct?

A. Y'all didn't talk about anything?

Q. And what was Mr. Lilly's response, if you recall?

A. He said, stated, no.

Q. Then you were present throughout this, did you hear Investigator Fleet ask the exact same question at the bottom of Page 12 and Mark Lilly gave the exact same response, in that correct?

A. Let me find it. That's, that's correct, sir. Yes, sir.

Q. I believe he indicated that Ben drove away from the scene and that's Page 13, top of Page 13, is that correct?

A. Yes.

Q. All right. Do you recall asking, ah, Mr. Lilly if they needed any money and what was his response, [855] if you recall? At the bottom of Page 13 –

A. He stated they were broke.

Q. Do you recall asking him if he got any money out of these stores that were being robbed over there? Do you recall what his response that, and if the, I'm, I may have heard something else in the transcript. I'm not sure if –

MR. SCHWAB: Your Honor, may the record reflect that –

MR. TUCK: If the Court wants us to play it back –

MR. SCHWAB: That he couldn't have heard anything from the transcript. That if he heard something that it would come from the tape.

MR. TUCK: Your Honor, it's been a long afternoon.

THE COURT: I understand.

MR. TUCK: I, I, I can hold this up to my ear or –

THE COURT: Do you want to refer, do you want to refer to the tape?

* * *

[859] CLERK: Commonwealth Number, Exhibit Number Fifty (50) will be a lab analysis.

MR. SCHWAB: And the other item, Your Honor, is a Certificate of Analysis performed by Patricia Taylor, which I believe the Court had previously ruled could be admitted, but hasn't formally been admitted. It was filed on October the 7th, and by a faxed copy and we could do it as a A and B. We now have the original copy, so that –

MR. TUCK: The original would be a better, Your Honor, –

THE COURT: It would –

MR. TUCK: We have no objections to the original being submitted.

MR. SCHWAB: Your Honor, I believe it has also been stated and if the record could show that there has been a stipulation that the car in question was in the possession of Alexander D. Defilippis and was owned by a member of his family. That Benjamin Lilly has been

previously convicted of a crime under the laws of Virginia that is classified as a felony. With that, the [860] Commonwealth Rests.

THE COURT: All right, sir. Is that your understanding of the stipulation?

MR. TUCK: Yes, Your Honor, we do stipulate to both of those items.

THE COURT: All right, sir. Thank you. The stipulation is accepted, an well as the exhibits. All right, the Commonwealth has rested. Would the defense rather begin their call of witnesses now, or would this be an appropriate time to adjourn?

MR. TUCK: Your Honor, since I've released all of our witnesses, I don't believe that we could start.

THE COURT: Oh, we did. All right.

MR. TUCK: Right now. We went ahead and sent them all home.

MR. JENKINS: And, Your Honor, we must renew our motions at the end of the Commonwealth's case –

THE COURT: All right, sir. We will take up those in a moment.

MR. JENKINS: Okay. in the morning, Judge?

* * *

* * *

[900] wanted to know why the guns were in the living room because Warren is not supposed to be around guns and Warren told me to just calm down that they, that Mark was getting the guns and taking them to the car.

Q. All right. And did Mark grab up the guns and do that?

A. Ah, yes, he did.

Q. Okay. Now, when you came in, I believe, under direct testimony you indicated that Ben Lilly had a liquor bottle in his hand, is that correct?

A. Yes.

Q. During that period that you were there, did you ever see Ben Lilly with any of the guns?

A. No, Mark was the only one handling the guns.

Q. Mark was the only one handling the guns?

A. Uh-huh.

Q. Now, what else was occurring in, that evening? They've got some liquor in there. Is there anything else going on?

A. Yeah, after the guns were taken out, ah, [901] I had went back to the bedroom to, ah, get ready for work and, ah, when I come back out, ah, he had coins laying in the floor and, ah, –

Q. Who had coins laying in the floor?

A. Mark did.

Q. All right. And –

A. He was going through them, you know, observing, looking at them, ah, and that's when he, ah, I noticed he said, here's a money clip and he grabbed it up and stuck it in his pocket and said he wanted that for himself.

Q. Okay. What did, now, and I believe you indicated that he grabbed it up really quick?

A. Uh-huh.

Q. It was gold?

A. Uh-huh.

Q. Do you remember anything else about the money clip itself?

A. No, sir.

Q. Were these things and, now, you said the coins, were they in protectors and things like that?

[902] Were they, some of the coins in like I say a protector is a –

A. Oh, I know, ah, a piece of paper, –

Q. Yeah.

A. Well, it's not paper, but it's, well, it is part of its paper and part of it's like a plastic, yeah. Okay.

Q. Okay. Now, I know you only saw it briefly. Can you tell me, all right, and I want you to be honest with the jurors and the Court, can you tell whether this was the one that Mark Lilly had or not?

A. No, because he, he grabbed it so fast. There's no way.

Q. But it, what you recall was that it was gold?

A. Yeah.

Q. Okay. Now, after Mark grabbed it up and said this is mine, what else was, what else was done? Or if you recall, what were they doing specifically? Were they drinking?

A. Oh, yeah. They were taking turns passing

* * *

[932] Q. I'm going to show you Exhibit Number Two (2). Do you recall seeing that?

A. That's the vehicle.

Q. All right. Now, how long have you known Gary Barker?

A. Ah, I went to school with him for about three years.

Q. All right. Are you familiar with his general reputation in the community for being truthful or untruthful?

A. Yes, sir.

Q. And what is that general reputation in the community?

A. He would basically blame anybody else for something that he would do.

Q. Is it –

MR. SCHWAB: Your Honor, that's a non-responsive answer.

MR. TUCK: I don't believe that's a responsive to the question. If you can't –

THE COURT: That, that, excuse me.

[933] That is correct and the jury is instructed to completely and totally disregard that response.

MR. TUCK: All right.

Q. I want to ask you, now, you can either say his general reputation in the community is for being truthful or untruthful. Either one of those, those are your two choices as I understand the law to be. Which one of those choices would you choose in regard to Gary Barker's general reputation in the community?

A. Untruthful.

Q. All right. Do you know Ben Lilly?

A. No, sir.

Q. Have you ever met Ben Lilly?

A. No, sir.

Q. You do know Mark Lilly?

A. Yes, sir.

Q. All right. And how do you know Mark Lilly?

A. Huh, I used to work up at Dominion Skating Rink and he used to come up there.

Q. And so that's the only relationship you

* * *

[946] A. That'll be fine.

Q. I know you're a little bit nervous. Just take a deep breath and try to relax. Now, back in December of 1995, was Mark and Gary renting a room from you in a Merrimac Trailer Court? I think it's called Holly Court.

A. Yes, sir.

Q. And what lot number was that?

A. Thirty.

Q. And I'm going to draw your attention to December the 4th, the day before Alexander Defilippis is abducted. Do you, what were you doing that afternoon?

A. That afternoon, I was working on my truck.

Q. All right. And what, if anything, you were, do you recall happening as you were working on your truck?

A. Ah, just that Gary was helping me work on the truck for a little bit.

Q. Gary came by?

A. Uh-huh.

Q. All right. And when, when did Gary arrive

* * *

[950] Q. All right. And did there come a point in time when they brought something into the house?

A. There, yes, there was a point in time where something was brought in the house.

Q. And what was that?

A. There was, ah, three (3) guns brought in the house.

Q. All right. And who brought the three (3) guns in the house?

A. They were being carried by Gary and Mark.

Q. And was Ben Lilly carrying the guns into the house?

A. No.

Q. Now, was anything else brought into your house?

A. No, not that I know of.

Q. All right. Was there any liquor or alcohol brought into your house?

A. There was some, yes.

Q. How much?

A. Ah, a few fifths.

[951] Q. All right. You say a few fifths. Is that two, three, four?

A. About three or four.

Q. All right. Did they offer you any and, and who brought it in?

A. Ah, I'm not sure exactly who brought it in, but I was offered some.

Q. All right. And you drank some too?

A. Yes, sir.

Q. Did Ben Lilly drink some?

A. A little bit, but not much.

Q. All right. He had a little bit to drink, but not much. And what about the other two? What about Gary and Mark?

A. They drank a little bit too.

Q. All right. But not much?

A. Not much at all.

Q. Okay. So, they were drinking. Now, the guns that are, are there, did you see Ben Lilly pick up any of the weapons?

A. No, I did not.

* * *

[954] pistol. Does this look familiar?

A. Yes, it does.

Q. All right. And why does that look familiar?

A. Well, that gun was one of the guns that was brought in that evening.

Q. All right. And you indicated the guns came out one more time. What was done with the guns when they came out?

A. Well, ah, one of the guns was, ah, kind of pointed at, at me and, ah, I'm not sure if it was in a joking manner or, or what, but –

Q. Which one of the guns were pointed at you?

A. It was the, ah, it was the 30/30.

Q. 30/30 rifle?

A. Yes, sir.

Q. And who was pointing the gun at you?

A. Gary.

Q. Do you know whether it was loaded or not?

A. I have no idea.

Q. All right. So, he pointed it at you and [955] you said you didn't under-, know whether was, he was joking and you didn't know whether he was not joking?

A. Right.

Q. Well, what, what lead you to that conclusion?

A. Well, –

MR. SCHWAB: Objection, Your Honor. That answer calls for a conclusion.

MR. TUCK: What factors? He, he, he has a conclusion. He's –

THE COURT: I, I, I do sustain that, but go ahead and rephrase. I think you can get to it.

Q. What factors specifically, I'm talking about what factors specifically lead you to believe that you didn't know whether he was joking or not?

A. Well, we were drinking and, ah, you know, when, when a person is on alcohol, you know that they don't always do the things that they mean to do –

Q. All right.

A. And so that's why, what brought me to the assumption that, you know, he might have been joking and

* * *

[961] A. No, sir.

Q. And what are they saying, well, strike that question. Now, so they come up there and they're talking and what occurs after the conversations?

A. Ah, there was, ah, there was just a few words exchanged, ah, the neighbor we went to go visit got a little harsh and, ah, then after that, ah, I seen the, ah, Mark with the, with the gun, with the gun that you just showed me there.

Q. The pistol?

A. Yes, sir.

Q. Where did Mark have it on his person?

A. He had it in, in, ah, a sweater jacket with a pocket on it and a hood.

Q. And what was he doing with that weapon?

A. Well, I, I heard it, I heard it click back.

Q. And you say you heard it click back. What are you talking about?

A. The pistol.

Q. All right. You heard it click back again.

[962] You heard the pistol click back. Was there a portion of the pistol you heard click back?

A. Well, the hammer.

Q. All right. And what did you see?

A. Ah, I saw it brought out just, just a little bit, not much. You could barely even see it. It was just –

Q. And what did you do when you saw the gun coming out?

A. I looked at him.

Q. And is that it? You just looked at him?

A. I looked at him and kind of pointed my finger towards him.

Q. And why did you –

A. Then –

Q. Why did you do that?

A. Well, I had a feeling that the gun was going to be pulled.

Q. Let, whoa, whoa, whoa. You, you can't get into your feeling. I –

MR. SCHWAB: That's okay, Your Honor.

[963] Q. You saw it coming out?

A. Yes.

Q. And you pointed at him. I, I cut your answer off when you were asking, answering that question. You were pointing it, a, the finger –

A. Right.

Q. At Mark Lilly and you were getting, did you say something when you pointed the finger?

A. No, I didn't say anything.

Q. Okay. And what did he do when you pointed at him after he pulled the hammer back on the, the revolver?

A. He put the gun away.

Q. He slid, when he said put it back, where did he put it?

A. He, he, he slid it back in his pocket. He didn't have it all the way out. He just slid it back in his pocket.

Q. Now, you indicated, ah, that there was some, ah, like heated words, is that correct?

A. Yeah, ah, it, ah, the neighbor, the [964] neighbor that we went to go visit got a little harsh like I said.

Q. He got a little harsh?

A. She got a little harsh.

Q. She got a little harsh. She was angry?

A. Ah, no, she wasn't angry. She's just that way.

Q. Okay. I think we probably all know a few people and that's when Mark pulled out the revolver and pulled the hammer back?

A. Correct. He didn't pull it out all the way. He just slid it out a little bit.

Q. And, and pulled the hammer back on it?

A. Right.

Q. And they weren't drinking at that point in time?

A. No, sir.

Q. Okay. When, all right, he pulls the hammer back. What happens after that?

A. Well, ah, after he slid it back in his pocket and everything they got up and left.

* * *

Testimony of Alfred Fall/Cross

[973] other trailer?

A. Maybe about, I'd say about a couple hours, two hours.

Q. Could you tell if they had been drinking in that period of time?

A. Ah, I couldn't tell at that time either.

Q. And when you pointed at Mark, he slid it back in and then they all left?

A. Yes, sir.

Q. And that's the first time you'd been around Ben?

A. Uh-huh. That's correct.

Q. They didn't tell you they were leaving anything at the trailer?

A. No sir, they did not.

Q. In terms of old coins or anything?

A. I wasn't informed of that, any of that.

Q. And where, what were they renting exactly?

A. They were renting one bedroom.

Q. Okay. And it's two bedrooms?

A. It's a two, it was a two bedroom trailer,

* * *

Testimony of Howard Barnett/Direct

[990] A. But as he leaned on the bar, well, I watched, I was looking at him.

Q. And he looked at you right in the face?

A. Yes, sir, he did.

Q. And did he tell you –

A. He told me, he told me to not to look at him either.

Q. He told you not to look at him?

A. Yes, sir, he did.

Q. And did he have anything in his hand?

A. And at that time I was, at that time I was very shook up just to tell you the truth.

Q. I can imagine. Did he have anything in his hand?

A. Yes, sir, he did. That's what I said, he had a pistol in his hand pointed at me.

Q. Does this resemble or the pistol that he had in his hand?

A. Well, I'll have to say that at that time I was probably so scared that I thought it looked bigger, but it did look a little bit bigger, but, yes, it does

* * *

[1020] there was something in your mind? Was there a reason why you didn't want Michael to go?

A. Well, the remark that Gary had made, yes, sir.

Q. All right. And what was that remark specifically?

A. That he could kill his beat friend without regretting it.

Q. And that was the reason that you didn't want your son to go with them?

A. Yes, sir.

Q. All right. And this was approximately 1:30 the afternoon of December the 5th, is that correct?

A. Yes, sir.

Q. All right. Your Honor, that would be all the questions I have for this witness. We would offer it for the truth of her, why she did things. Not for the truth of the matter asserted, which was a different ground than we originally based it under. We would also raise it under the ability to be able to impeach for the reasons stated earlier. This is, would be her testimony

* * *

[1040] remind you once again that you're still under oath.

PATRICIA QUESENBERRY: Okay.

THE COURT: And you're being, being recalled to answer certain questions that Mr. Tuck may have or certain questions that Mr. Schwab may have.

MS. QUESENBERRY: Okay.

PATRICIA QUESENBERRY RECALLED

DIRECT EXAMINATION

BY MR. TUCK:

Q. - I know just a few minutes ago I asked you a question about, you indicated that you had said, you didn't want Gary Barker and Mark Lilly to stay at your home, is that correct?

A. Yes.

Q. And why is it that you didn't want them to stay at your home? What specifically?

A. Ah, because I had asked them a question, what would they do if the law would get after them, ah, because I knew that they were out doing things that they shouldn't be doing, and, ah, -

Q. Was that driving without a license?

[1041] A. Yes.

Q. None of them are licensed?

A. Yes. Yes, ah, and Gary jumps up off of the couch and he says that I'll take a gun and blow out the back window and then I'd shoot anyone that would try to take him.

Q. All right. Now, and that's one of the reasons that you went to Warren or that was the reason you didn't want them to stay there?

A. Yes.

Q. Thank you. No further questions.

THE COURT: Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Where was Ben when Gary said that?

A. He was sitting on the couch beside Warren.

Q. And did you say Gary jumped off the couch too?

A. I have, I had two couches in the room there, I'm sorry.

Q. Okay. Are they across from each other,

* * *

[1045] DIRECT EXAMINATION

BY MR. TUCK:

Q. Mr. Nolen, I'm going to draw your attention to December the 4th. Do you recall that? I believe you've already testified about that.

A. Yes, sir.

Q. And I'm going to draw your attention further, I believe you indicated on direct examination by Mr. Schwab that there was a reason why Ms. Quesenberry didn't want them to stay there and you asked them to leave, is that correct?

A. Yes, sir.

Q. And what was that reason?

A. Because a comment that Mr. Barker made.

Q. And what was that comment?

A. A comment about if they got stopped or anything he would shoot the back glass out, shoot a cop or anybody.

Q. Okay. And you asked them to leave after that point?

A. Well, she asked me to ask them to leave.

* * *

[1061] Q. Okay. I'm asking you what happened?

A. What happened.

Q. Just start from the beginning. Let's start off with what you saw happen and then I'll stop you if, if I have any questions. How's that?

A. Well, –

Q. Just go from the beginning and, and, you've got –

A. Word for word, I really don't know what was said.

Q. Well, I'm not asking you what –

A. Ah, but we know that a gun was pointed at Howard.

Q. All right.

A. He was told to get on the floor.

THE COURT: I think if she didn't hear any statements made, I think she needs to confine her testimony –

MR. TUCK: All right.

THE COURT: To what she herself observed.

* * *

[1087] and what did you see when you came into the store?

A. Okay. This was the first time.

Q. Okay.

A. I came into the store and do what I was, and got some things, which I do ever night mostly and put them in my car and, ah, –

Q. Okay. And after you put them in your car, were you outside when a, I believe it's a Dodge Aires pulled up? And I'm going to show you –

A. The, the one thing as I was going out the door, one of my clerks, clerks said there had been a robbery at Eggleston.

Q. Okay.

A. And I went on and put my, ah, I had –

Q. Okay.

A. I was coming through the door –

Q. Okay.

A. In to get the things and the clerk was coming out and she told me says there's a robbery at Eggleston –

Q. Okay.

[1088] A. And I just, I didn't, you know, like, you know, pay much attention. So, I came on in and got my what I do, put in my automobile and –

Q. All right. Then you were out and then I believe this car pulled up, is that correct?

A. Yes, sir, it was something, looked like that, yes, sir.

Q. Okay. Or something to that, a car, a vehicle looking like that? There were some individuals in the car, is that correct?

A. Yes, sir.

Q. Three?

A. Yes, sir.

Q. And did you see two or three of the individuals exit the vehicle or one of the individuals?

A. Well, it's, I think all three of them were out, or getting out and looking at this, ah, Chevrolet car.

Q. All right. Was that where you were at?

A. No, I was back down from it. Kindly in front of the store.

[1089] Q. All right. And then did there come a point and time when they got back into the car?

A. Well, I –

Q. Or did they, did they get in the car and leave or –

A. No, no, sir.

Q. Okay.

A. Two of them, two of them came, came by me and I was out there, I don't, ah, fooling around the Christmas trees.

Q. Okay. Because it was almost Christmas.

A. Then, I, I got to suspecting something so I got the license number.

Q. Okay. Now, where had the third one gone? You said the other two walked by you? Where was he? Did he –

A. He was in the automobile.

Q. He had gotten into the car?

A. He was in the automobile, yes, sir.

Q. And when you say automobile, not the Chevrolet, but the Dodge –

[1090] A. Yeah, the maroon looking car.

Q. Okay. And then I believe that you, the last thing you said that you saw the other two walking towards the store?

A. They passed right by me and they, one of them, they spoke to me, I can't remember what they said.

Q. Okay.

A. And, ah, –

Q. So, you, I believe you said you were messing with some Christmas trees?

A. Well, just fooling around, but I, you know, I was suspicious at that time.

Q. Okay. And then what did you do next?

A. Well, I just fooled around there and they went on in the store, and, ah, I don't know what happened, I kindly cautioned, all caution left me, and, ah, I just walked right in and walked right in on it.

Q. All right, but in on what? You said –

A. On the robbery.

Q. All right. And who was in there, do you know?

[1091] A. Ah, my clerk, Mona Hylton.

Q. Right.

A. Ah, a blonde headed guy.

Q. All right.

A. And another fellow.

Q. All right. Was this the other fellow that came into the store?

A. No, sir.

Q. Okay. So, there's two fellows in the store and what are they doing? Are they buying things?

A. No, sir. Ah, the blonde headed fellow has the gun on my clerk.

Q. Okay. Now, I'm going to show you a gun. Does this appear to be the gun that he had on your clerk?

A. Yes, sir, it looks like that.

Q. Okay. All right. So, he's got a gun on your clerk. What do you do, Mr. Williams?

A. I walk right toward him. I –

Q. And what does he do?

A. Well, I, I think I got, I'm not sure not, but I think I got a hold of his arm.

[1092] Q. Okay.

A. And I pushed him kindly back in a, the gun hit me in the stomach, you know, the barrel –

Q. Uh-huh.

A. And I don't know what happened. I just backed up.

Q. All right. Did he say anything to you at that point in time?

A. Yes, sir.

Q. What did he say to you?

A. He said, I'll blow your head off.

Q. Okay. And who was that that had the gun?

A. The blonde headed fellow.

Q. All right. Did he point the gun at you when he said that?

A. Yes, sir, he sure did.

Q. And what did he do after that? I mean –

A. I, I told the clerk, I said, give him the damn money, Mona.

Q. And then what did you do after that?

A. And the other, the other guy walked, got, [1093] grabbed the money, went back and took the money and Barker, the blonde headed fellow, held the gun on me and backed up till he got out the door.

Q. And then he ran away?

A. I suppose so. He –

Q. All right. Now, do you recall hearing any, you indicated that he poked the gun in your belly. Do you know, or did he just jab it at you to get you back or was it just part of the struggle?

A. Well, I was going forward to him, I think, as I, well as I remember.

Q. Okay. But you do recall him putting the gun up to your head and saying, I ought to blow your head off –

A. Yes, sir.

Q. Or I'll blow your head off?

A. Yes, sir.

Q. Okay. Now, after they left, did you go after them?

A. I waited a few minutes. I started out the door, it seemed like a few minutes, I, you know, was a

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Testimony of Bill Williams/Redirect

[1103] sorry, I didn't, I thought Mr. Schwab –

MR. SCHWAB: I'm through. That's fine.

MR. TUCK: Okay.

REDIRECT EXAMINATION

BY MR. TUCK:

Q. Just one question. When, you indicated they went in the store there and they were in there a while. Was Mona Hylton laughing? At any point in time was she laughing?

A. No, sir.

Q. Okay.

A. Not during the robbery, no, sir.

Q. All right. Thank you.

THE COURT: All right. Mr. Williams, thank you for your testimony. Is he to be excused?

MR. TUCK: Yes, Your Honor. Please let him go back –

MR. SCHWAB: We have no further reason.

THE COURT: Mr. Williams, you are excused. Appreciate you being here. You may leave.

A. I can go home, right?

* * *

Testimony of Mona Hylton/Direct

[1113] key every way I could. Well, Bill come in about that time, and he said, what's wrong, Mona, and Barkley says, lay in the floor.

Q. Where was the gun when he –

A. On the counter.

Q. On the counter.

A. And Bill grabbed him and they went in a candy rack and, of course, he dropped the gun, but Barkley got it and he pointed the gun at Bill, he said, I'll shoot your damn head off.

Q. All right. Now, how far did, I believe you called him Barkley. Was he the short guy?

A. Yes.

Q. How far was the gun away from Bill?

A. You mean after he pointed it at his head?

Q. Yeah. Yes, ma'am.

A. It was right up to, almost at him.

Q. Almost at him. Ah, within two feet of him?

A. Well, about like this. Well, no, you come a little closer.

[1114] Q. Okay.

A. And it was up like this.

Q. Looked like that?

A. So, –

Q. And then, all right, go ahead. I'm sorry.

A. When I looked because I felt like he, he was going to get me and when I looked he had the gun right up and Bill and the hammer was back on it. He said to Mark Lilly, he said, get the money and run. So, he run.

Q. The hammer was cocked back on that pistol?

A. On the gun.

Q. On the gun.

A. Because I was standing right there looking right at him.

Q. And then what happened after that?

A. Well, after Mark grabbed the money and run why he run.

Q. Did you see the automobile that they came in leave the convenience store?

A. Yes, I did.

[1115] Q. Okay. And ma'am did it go towards Blacksburg or which way did it go?

A. Well, it went right there at the corner and made a right when I saw it.

Q. All right. That would mean it would go towards Blacksburg, then made a right, would that be correct?

A. Yeah, right there.

Q. It would go back towards the old bridge?

A. But I, see I can't see that far.

Q. Yeah.

A. I do know that it turned.

Q. You do know that it had turned?

A. Yes.

Q. Now, ma'am, just one more question, please. Did, while this robbery was going on or this entire transaction, did either you or Bill laugh during the time that it was going on?

A. Laugh?

Q. Yes, ma'am.

A. No, sir!

[1116] Q. That never happened?

A. No, sir.

Q. Okay.

A. No, sir.

MR. JENKINS: Thank you, Judge.

THE COURT: Thank you, Mr. Jenkins. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Ms. Hylton, the way you made your arms, did Mr. Williams sort of bear hug him?

A. Yes, you know how they –

Q. From the side or the back or –

A. Well, it was right at the side, right at the side.

Q. And then they went into the –

A. Candy rack.

Q. And the gun was still in the shorter, blonde headed person's hand?

A. Right.

Q. Did it go off then?

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Testimony of Clarence Hutchinson/Direct

[1143] A. Ah, –

Q. As far as, ah, I'm not discussing any time that you have, may have spent together, but specifically as far as in, in the, did you know him socially or did you know him from work?

A. Socially.

Q. All right. And did you hear others discuss what his general reputation in the community was for being truthful or untruthful?

A. Yes.

Q. And I'm going to ask you, do you know what that reputation is?

A. Yes.

Q. And what is his reputation?

A. Untruthful.

Q. All right. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. How did, where did you know him at this

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[1219] foreman, but the form book says that and it's on the computer. It's much easier than trying to figure out ahead of time who goes where. The top is to find him guilty. The bottom is you find him not guilty. There's one for each offense except for the ones concerning murder. The Judge has given you instructions as to capital murder, first degree murder and second degree murder. If you find him not guilty of capital murder, then you'll have to put not guilty on this one and continue to one of the others. If you find him not guilty of first degree, you write that on this and then you go to the second degree one. If you find him not guilty on second degree, you'll put that on the bottom. If for example you determine he's not guilty of capital murder, but guilty of first degree,

you would have whoever you select as your foreman or forewoman or foreperson to sign not guilty on the capital murder and then guilty on the first degree murder, if that's what you find, and then you won't have to worry about second degree murder, if you got that far. And the one I had on top was whether Ben Lilly is guilty or not guilty of [1220] possessing a firearm after having been convicted of a felony. We can take care of that one right now. You really don't have any choice. It's been stipulated he's a felon. The witnesses have testified he handled a gun. He stated on the tape he handled a gun and his attorneys have essentially said he handled a gun and that's minimum. I won't go into everything else that says he may have had a gun or he was in possession of a gun, but we know from Mr. Lucas, no one's disputed that, that he took the rifle and put it in the trunk. That was in Montgomery County. This one you fill out on the top line. The elements of the other offenses, what crimes were committed, we can start with carjacking. Now, forget what Ben Lilly said, forget what Gary Barker said and forget what Mark Lilly said, what do we know? Tom Staeger was with his friend. They pulled into the mini-mart there in Hethwood. Tom went in to make copies. Alex got out to look at his tire. He comes out, Alex is gone, his car is gone. Tom can't find him anywhere. He doesn't know where he went. He wasn't expecting him to go anywhere. Tom's book bag is in the car. They're going [1221] to the library. They're supposed to go back to the apartment and return the notes. He's gone. Well, that was about 7:00. Around 8:30 or so, that car, Alex's car, the one Alex was in with Tom and Tom's things that they were going to the library to study for is on the side of the road

in Giles County. Alex isn't anywhere around. One person is right there. Another one is later found near the cars identified as having been involved in a robbery and it has things in it that belonged for the robberies in Giles County. Where is Alex? Does it sound like somebody took Alex's car? Does it sound like they took it when Alex didn't want them to? Yes. And where is Alex? Nobody knows at that point. Does it sound like Alex was abducted? Does it sound like that he was taken by force? Or intimidation against his will and deprived of his liberty? It just sounds like that to begin with. His watch is in the back of the car in Giles. His wallet is found out in the ground. This we all know around 8:30, 9:00 that night. The wallet is found the next morning, but the watch was there. Where is Alex? They find Alex. Alex, as you saw in the pictures, is laying [1222] there in his socks and his underwear on a cold, December night, with four (4) bullet holes in him. Did somebody take Alex's car against his will? Did somebody take Alex against his will? Did somebody take his clothes and his possessions against his will? Did somebody deliberately shoot him? You saw he was hit three (3) times in the head. Was it willful? Was it deliberate? Yes. All you have to do is look at the picture. All you have to do is hear the doctor talk about where the bullets went. That was no accident. Did it happen during a robbery? The Judge instructed you that the killing occurs during a robbery when the killing and the taking of the property occurred so close in time and distance and causal relationship that it's all part of the same thing. It doesn't matter if the taking came first or the killing came first. If they're that close together, they're all right there together and it's by the same people, it was a killing

during the robbery. if you can look at the photographs and where the wounds were and have any doubt whether who did that, meant to do it, intended to do it, as the Court instructed you, had a specific intent to [1223] kill and there's a blood trail. So, Alex didn't go down to begin with and Dr. Oxley told you, that one that killed him would have caused instantaneous unconsciousness. He couldn't have been shot with a fatal shot to begin with. So, whoever kept pulling that trigger intended to kill Alex. That's willful, that's deliberate, that's premeditated and in every case there's a gun. There is no doubt whatsoever as to any of the elements of the offense. The only question you have in each one is whether it was the defendant who committed the crime. That's what this case is all about. You've been given all this evidence. It tracks across three (3) counties. It tracks across a little more than twenty-four (24) hours. It tracks across different places and different crimes, but it doesn't change the crimes. There is no question an to the crimes. As far as the Commonwealth would submit, you can throw second degree murder verdict form away. if you can look at those pictures and think that it wasn't premeditated, that it wasn't willful and it wasn't deliberate, then you haven't been here. if you can look at those and know that his

* * *

[1229] you don't know beyond a reasonable doubt that bullet came from that gun? No. It's not absolute proof. It's proof beyond a reasonable doubt and there's no other evidence to refute. Ben Lilly told the police, well, let's back up a second here. Gary Barker is the key to the case to a certain extent. Not the only key. He's not the only evidence. You've got to decide if Gary Barker is telling

the truth. About everything? No. They bring in two witnesses to show you his reputation for truth and honesty in the community. A thief and a rapist, who obviously doesn't like Gary and who by the way, said Gary always blames everything on everybody else. Wonder why Gary confessed to all those crimes in that case? You must not shift everything to everybody else, because he said he robbed, he said he broke in a house, he stole, he got in the car with them while they took it, he carried the gun into the two places in Giles. He shot the rifle out of the window, so he must not blame everything on everybody else. Then they bring in another burglar and thief to tell you that seven years ago when Gary would have been, I think I was wrong the other day, somewhere [1230] around 13 or 14, they talked about his truth and honesty in the community. We know he's not honest. He sat right there and told you he wasn't honest. He said he was a thief. He told you he did all these things that night. Of course, he's got a rotten reputation. Does that mean every word he says is a lie? No. Because Mr. Sanders told you all that stuff was stole at his house. The stuff that Gary Barker told the police where to find it under the couch at A. J.'s place, so was Gary lying? Gary Barker told the police where they would find Alex. Was he lying about that? They're going to tell you all about selected lying. And it's somewhat what I've told you about. Only they want you to take the little pieces and disregard everything. I want you to take the little pieces and sort through it. I want you to figure out who is telling the truth. Was it Ben Lilly who told Investigator Price he was eating a Granola Bar? He didn't never have a shotgun? Was it Officer Tilley who told you he had his gun out and said

three times, put it down, put it down, put it down and had no doubt that this shotgun sticking out the corner of that door was what Ben [1231] Lilly had in his hand? Doesn't look much like a Granola Bar, does it? Ben Lilly told you through his statement to the police, that they picked him up on that night on Price's Fork Road. He didn't know where they got the car. If you remember the testimony, and how you got to Whitethorne? We went down Prices Fork Road, then you turn. Then you went down the McCoy Road. Where was Alex when Ben got in the car? Where was he? Which one of the three you heard from that night never saw Alex? Which ones? Did Mark see him? Yes. Gary see him? Yes. Ben see him? No. What's that tell you? What does that tell you? For a few minutes that night while Ben sat in the car while the Giles County Police officers searched the woods for three people armed with assault rifles is what Ben told them to begin with. While they did that, while those officers didn't know what was going on where people were with other weapons, Ben had to sit in the back of that police car, and he had to sit there, and he had to sit there, and he knew he wasn't going anywhere and for a few minutes, Ben Lilly's humanity popped through. He got on the loud speaker and he called for his brother. [1232] He said, Mark, come on in, Mark. You're not the one who has done anything really wrong. Okay. You want to believe Ben Lilly then? Fine. So, that eliminates Mark. Then what else does Ben do? He asked the Chief of Police for Pearisburg, can you do me a special favor? Can you do me a special favor? Can you take that shotgun and stick it in my mouth and pull the trigger? For one moment Ben Lilly had remorse, and the officer as most people would be

says, what do I look like a murderer? And Ben says me. And he said what does a murderer look like? And the conversation goes along and he says me and then what does he talk about after that? I'm going to hell and meet my brother. Why on earth would Ben Lilly go to hell if he just got picked up by his brother and this other guy with nobody else in the car? All he did was buy beer at a couple of places and he was scared to death of those two, because he couldn't believe what they were going [sic]. Now, why would he go hell for that? He wouldn't go to hell for that. Ben Lilly knows why he's going to hell. Two people said Ben Lilly shot Alex Defilippis. Nobody, nobody and no evidence has said Ben [1233] didn't shoot him. They're going to tell you that Gary must be lying because he got fifty-three (53) years. Do you want to know what I think of Gary Barker? I think of fifty-three (53) years. That's what I think of. That's what he got. The minimum sentence he could have got. Why? Because at 9:47 on that night he started an interview with investigator Price and he told them everything. He told them that he was involved in a robbery there. That he had the gun. That he fired the shot out the back. Where did the car come from? We got that in Blacksburg. What happened to the gun? Investigator Price said he became very emotional and he told them Ben had taken a gun, the pistol, gone over and got the guy, they had driven out and then they had shot him. He drew them a map where to find the body and they found the body. So, between those two things, we know Gary Barker is telling the truth and Ben is lying. Ben wasn't even there. Ben must have driven right past Whitethorne when Ben was in the car. Now, what about Mark? What did you hear Mark tell the

police? It's hard man. He's my fucking brother. There is no evidence [1234] before you that says Ben Lilly didn't kill him and there is evidence before you that says Ben Lilly killed him. Took him out, took his car, drove him down, stripped him down on a cold night, let him start walking away, and then went over and fired, and fired and fired and left him there. And if that stuns you, who else did you see, hear it bothered? Who else told you, who else have you heard who said that killing like that stunned them, bothered them, never seen anything like it? Two (2), Gary Barker, and in his statement, Mark Lilly. Man, I'd never seen anybody blown away like that. It wasn't like shooting a deer. Ben Lilly wasn't even there though. That's the evidence, Ladies and Gentlemen, in a nut shell, and look at all the other pieces. There in no doubt these crimes are committed just the way they are. There was car jacking, there was abduction, there was robbery and there was murder while they were robbing him part of the same thing because they never even drove off Every crime is there. The only thing that your duty is is to decide whether to put his name where it says defendant on the instructions and I submit to you that [1235] there is plenty of evidence for you to do so, and they're going to tell you you can't believe the other two. Gary Barker said he pled guilty so one day he'll have a chance to get out. He pled guilty. So, Michael Lang may not be exactly right, but he shifts all the blame to the other, and he set here on the stand and told you he was guilty of these offenses. Now, you're going to hear how with Bill Williams, Gary didn't tell you he stuck the gun up to Mr. Williams. Gary didn't tell you, he said, I'll blow your fucking head off. Material facts, materials facts. What did

Gary tell you? What did Gary tell the police? He went in with a gun to a convenience store, he had a gun out, he was waving it around, they asked for money. Armed robbery. Mr. Williams says he comes in, he's got the gun out. Now Ms. Hylton said they got it, rested it on the counter. He comes in, he grabs him and he turns around and he points the gun at him, he said, I'll blow your head off. It's still armed robbery. It's still armed robbery? Sure it makes Gary look a lot better, but it doesn't change what he did. Does that mean Gary was lying about everything just because he left [1236] out the part where he put the gun? Because he stuck his head right in it. He is guilty of armed robbery. And if he stuck that gun out of the window and he shot back at Mr. Williams or he stuck it up in the air. It doesn't matter. He told you he fired the gun back there. it didn't hit Mr. Williams at either way. Material fact. on the material facts, you take all this evidence together. It is very little on material facts that you can believe that Ben Lilly told anyone except for what he said on the loud speaker and what he said to Mr. Chief Whitsett. Then Ben was back down there telling you how he was, he was trying to save Mrs. Barnett. You heard Mrs. Barnett. Was Ben down there trying to save her? Was Ben part of the robbery. Did Ben not know what was going on? What did Mr. Barnett say? They were going the wrong way. They were going towards McCoy. They must have gone around. They come down the road, they're lights are on, they turn off their lights. Then they turn to the darkest part of the road and then they still don't got out of the car. They wait till he walks across the street and goes in his store. Ben says, well, we [1237] were just stopping to buy some beer. Ben left money on

the counter, do you remember? Did you hear the Barnetts say they had any money left in the store after those three left? Ben Lilly is guilty of each and every offense because if Ben Lilly didn't pull that trigger, then who did? Who did? Who has anybody ever said from this witness stand pulled the trigger but Ben Lilly? Who? Where is the evidence? You've got evidence that Ben guilty, Lilly is guilty. You have to weight it and them come to a verdict. Thank you.

THE COURT: Thank you, Mr. Schwab. All right, gentlemen, the defense.

CLOSING ARGUMENT BY MR. JENKINS

May it please the Court, Ladies and Gentlemen of the jury, first of all, I would like to thank you too. As I told you in the very beginning, we were appointed, Chris Tuck and I, and I certainly want to thank Chris Tuck. I have been practicing as you probably surmised a little bit longer than him and he was a pleasant surprise in this case. He has worked hard on this case and we both have worked diligently. Now, if you want to accept [1238] the word of Gary Barker as the gospel, then we may as well go home, but that's not what the Court told you in these instructions and I will get with you in these instructions and I will tell you what and how I think that the instructions and the law and the facts ought to be applied. We are talking about when we speak of law of the Constitution of the United States, Constitution of Virginia and what the rules and the laws and the regulations in this country tell us that we must do, tell us what we have to believe, tell us about presumptions of innocence and they tell about what weight to give to accomplices. Now, as I

say, it's pretty hard to argue with somebody that says we admit that Gary Barker didn't tell the complete truth and I'll get into that later, but who are we talking about today? Of course, there's a young man dead. I'm very sorry for that, but we're talking about Ben Lilly over here. We're talking about this man right here (pointing to Benjamin Lilly). He's an American citizen who is just exactly the way you are, and the way anybody else is when he comes into this Court. What does Judge Grubb tell you about Mr. Lilly? [1239] He's presumed to be innocent and the burden still rest upon the Commonwealth to prove beyond a reasonable doubt that he committed these crimes. To start out with, I'd like to go into the reasonable doubt. I'd like to go into some of the evidence that you heard. I'd like to go into the fact that there's a blonde headed man at a telephone booth. That's the only person that anybody saw. They didn't see Ben Lilly there. They saw a blonde headed person in the telephone booth. This young man told the police when they got a hold of him that he was going down the Price's Fork Road and he didn't have any part of that. Mr. Schwab wants you to disbelieve that and believe everything that Gary Barker said. Let's go and let's talk about that for a while. You heard Gary Barker testify, you heard him tell you about the way the shots were fired. The way I took his testimony to be was that it was almost point blank. You heard Dr. Oxley say that there were no powder burns on the body. Usually as someone is shot at point blank, there are powder burns that are left. That was according to Dr. Oxley. Well, that may create a red light to you. You may say, well, [1240] I don't know. Shouldn't we take a look at this young man's testimony a little bit more. Could he

have, been exaggerating trying to save his own hide? Well, maybe he was, but, of course, what Mr. Schwab says is certainly logical at points. If you wanted to take anybody's testimony as far as logic is concerned, you could say, well, yeah, there's certain parts that put together and certain that don't, but let's go a little but [sic] further. Let's go down the road, if we can, of where that we're getting to people who are independent of the three. People who were not with the three. Let's go on down the road, if we can, from the murder scene and let's go up to the little store in Eggleston, Virginia. Now Mr. Schwab, says, well, of course, he may have lied a little bit about what happened to Gary Barker in that Eggleston Store. Maybe he didn't tell the complete truth when he was handling that gun, but I want you to ignore that. I don't think you can ignore that. That man was under oath. He swore that he would tell the truth like anybody else when he got before you and you can consider that. If he would lie about that, if he would try to make it [1241] smoother for himself, what would he do on a very, very, very important part of who pulled the trigger on that gun? Now, I leave that to you. I don't think Mr. Schwab is going to try to tell you that you should not disbelieve or you should not disbelieve the testimony of the store owners at the small Eggleston Store. They have no ax to grind with anybody and what did they tell you that Gary Barker had? He was holding the murder weapon when he came inside there. Look at the evidence in this case and how many times did Gary Barker have that pistol? How many times was he holding it up? How many times was he waving it around? How many times was he threatening to kill somebody with it? Let's go on down the road,

if we can. Let's go to the convenience store at Pembroke, if we may, and let's trace that pistol along. Amazing that he had that pistol, isn't it? Here we go into the Pembroke Store. According to the testimony, Ben Lilly is on the outside. Is in the automobile. The automobile engine is running and what did Gary Barker say? He said, sure, I went into that store. it was kind of a little laugh, the woman was laughing and –

[1242] MR. SCHWAB: objection, Your Honor, he is misstating the evidence.

THE COURT: I think there is a slight distinction in your argument between what I perceive the evidence to be. If you'll just think back for just a minute and you can repeat it.

MR. JENKINS: All right. Well, at any rate, when he went into that store, I recall the evidence of the lady that was in, that Gary Barker said the lady was laughing.

MR. SCHWAB: It was Mark.

THE COURT: It was.

MR JENKINS: Mark. Yeah. Said they were laughing. I leave that up to you. That lady stated that she was not laughing. She stated that that wasn't funny. That's another contradiction in all of their testimony. They go on down the road and what does Gary Barker do? Gary Barker is in the automobile. Ben Lilly is driving and where did they tell you that the gun went out? It went out on the right-hand side of the road, on the right-hand side of the automobile. They had a [1243] tracking dog. A tracking dog had the scent of the people that got out of that car. Where did the tracking dog go? The

testimony was that he went over to that gun. So, you see Gary Barker had that pistol and he had that pistol at all times. Now, doesn't that kind of create a red light for you? Don't that tell you, do you believe him? Do I believe him beyond a reasonable doubt? That's what you must believe beyond a reasonable doubt if you convict Ben Lilly of capital murder. You've got to believe him as the gospel. Does he have a motive to lie? Of course, he did. He was trying to save his ownself. What did he do? And isn't it strange that he put this rifle, no matter where he put it, he put it to his mouth, he put it to his head, he put it somewhere on him and he was trying to commit suicide. Why? If he had nothing to do with this, if he was along for the ride, if he didn't know anything at all about this murder, if he didn't participate on it as a principal in the first degree, why would he ever want to kill himself? You are to determine that. You are to determine if he was telling the truth and as I say, some of you I noticed picked up small things that [1244] Gary Barker was saying that was inconsistent with what the other witnesses would say and you may not believe some of the witnesses such as Mr. Nolen, the home that he was in. You may not believe the other witnesses, but certainly you can't disbelieve the independent witnesses. The witnesses that were along in the robberies of what occurred in there. Do you believe Gary Barker? No, I don't think that you believe him and if he would lie on something small, he would lie on something big and what does the Court now tell you about Gary Barker's testimony? Gary Barker without any question is a convicted felon. You don't got testimony about a person's reputation who is a convicted felon from a rabbi, from a priest or a Presbyterian preacher. You get

their reputation from people Just like them that have a bad reputation. People that's been convicted of things. People that hang around with them together like the people that came in here and testified that they had a bad reputation for telling the truth. This goes to the weight of their testimony. It's something that you may consider and it's something that the Court tells you that [1245] you should consider in the instructions which the Court has given you. Now, some of this perhaps is circumstantial evidence and some of it is directed, the Court tells you in determining the circumstantial evidence it must not only prove the circumstances relied on, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proven must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt however strong or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. Do you think that every reasonable hypothesis on the circumstantial evidence has been excluded except guilt? it wouldn't be fair to Ben Lilly if you believe that, that at this time. Because after all, he's still presumed to be innocent and this presumption is an abiding presumption. it goes with him from the very inception of this case and it even goes with you when he's, when you're deliberating back into the jury room. It in what we call an abiding [1246] presumption. And what else does the Courts tell you? It tells you about being the judges of the credibility of the witnesses. You can consider the demeanor on the witness stand and you can consider a number of things which are only commonsense. But

when it comes to conviction of felonies, the Court tells you that the conviction of a felony for anybody that testifies up here is one consideration for you to give as to their credibility. it doesn't make their testimony completely out of bounds, completely for you not to consider on the fact that they've been convicted of a felony, but it is one thing that you can consider. Now, another matter that you consider is the fact that if you have, and I started to say if you believe that Gary Barker is an accomplice, but he's admitted that he was an accomplice. There is not any doubt about that and I'd like to read that instruction to you. Now, Mr. Schwab, is going to tell you this instruction now, I, it's kind of, of I don't want you to really pay too much attention to that.

MR. SCHWAB: Objection, Your Honor. He doesn't know what I'm going to tell them. If he could [1247] stick to his argument and leave mine to me, I'd appreciate it.

THE COURT: But we need, we need to once again make that distinction that this is anticipated.

MR. JENKINS: Your Honor, this is argument –

THE COURT: It is argument, but I want to caution –

MR. JENKINS: And you've already told them about that.

THE COURT: And I want to caution you in the future, but go ahead. That's all right.

MR. JENKINS: And I'd like to read that instruction to you and this instruction is a part of what this Court gave you, not what I say about it, or not what Mr.

Schwab says about it. Let me read you this instruction. The Court instructs the jury that while you may find, base your verdict upor. the uncorroborated testimony of an accomplice, to-wit: Mr. Barker, such evidence is to be received with great caution. Now, I [1248] repeat that, with great caution. The Court further instructs the jury that the testimony of an accomplice must be received, let me repeat that, must be received with great care and caution and if you believe the testimony of an alleged accomplice was false and that he was induced to testify falsely, either by fear of punishment or a hope of reward, you must disregard that testimony in its entirety. Nevertheless, if you're satisfied from the evidence of the guilt of the defendant, beyond a reasonable doubt, you may convict on the uncorroborated testimony of a single accomplice. Now, as I said, when he came in here, Gary Barker, and he testified, Mr. Schwab has already admitted, there is some of his testimony that's a little bit shaky and he was talking about the gun part of where he put the gun on somebody or what happened after this and, now, that's a little bit shaky, but as I say, if he wasn't truthful about that, would he be truthful with something that was really material? If he would be truthful about something that Mr. Schwab says is immaterial, would he be truthful about something that was material, especially if he had [1249] an interest in it, especially if he was trying to make a deal with the Commonwealth, especially if he was going to come up here and try to get off as light as he possibly could and he did get off light as he possibly could. He had these charges reduced to where he'll –

MR. SCHWAB: Objection, Your Honor. They weren't reduced.

THE COURT: They, they were not. Mr. Schwab is correct.

MR. JENKINS: I'm sorry, not reduced, Your Honor, but got the smallest punishment that he possibly could. Excuse me, Judge, I'm sorry on that I got carried away a little bit.

THE COURT: Excuse me. The jury is instructed to disregard the phraseology of, Mr. Jenkins made –

MR. JENKINS: Yeah. Disregard that statement and I'm, I beg your pardon for ever telling it. I didn't mean reduce, but I mean he got this, all this reduced punishment. I beg your pardon again. I didn't mean to tell you that would not be correct. The [1250] testimony of the witness may be discredited or impeached by showing that the witness has been convicted of a felony. He's been convicted of a felony, so you have a felon, you have an accomplice and you have a person whose testimony has wavered between falsity and the truth on immaterial matters, I might say. I don't know you might argue it's a material matter, but I think it was a immaterial matter that he testified to. As I say, if he did that, I think that that he would not be truthful. Thank you, Your Honor.

THE COURT: Thank you, Mr. Jenkins. Mr. Tuck, do you wish to continue the defendant's argument?

MR. TUCK: Yes, I do, Your Honor.

CLOSING ARGUMENT BY MR. TUCK

Both Mr. Schwab and Mr. Jenkins thanked you both or they thanked you all. At the beginning of this, I asked each and everyone of you, I said, if you can't pay attention for some reason, let one of the bailiffs know and one of you did, said, Judge, we need to take a few more breaks and I appreciate that because this is an [1251] important trial. Now, let's talk about the evidence. When I, when I went through my opening, I said let's look at some of the witnesses that we've got. Let's talk about Danny Sanders starting off over in Floyd County. Now, in Mark Lilly's statement, he says he doesn't even know where they were at. Doesn't know. Now he thought it was somewhere over in Indian Valley or some place over there, but didn't know where it was at. Danny Sanders says Mark Lilly has been over to my house. Mark Lilly knew where some of these things were. Now, let's also look and, and, and Mr. Schwab in his argument, he pointed out Page 13, Mark Lilly said, it's hard. He's my fucking brother, but on Page 5 when asked what they got out of the house, we said, and who went in? Just Ben. The officer said, just Ben? Yeah, just Ben. Then the officer says, Gary wasn't with him? And he says, oh, yeah, we were all in on it. Page 5, no problems that say your brother was the only one going into the house. Page 13, it's hard, because it's my brother. Let's look at the next witness, and I, but let's, let's talk about some of the things. We know the guns were taken. Mark Lilly [1252] knows where they're at or at least Gary Barker does. Gary Barker knows about the guns hidden under the couch. Gary Barker knows about the safe behind the bar and knows about the bar and they're saying, well, we went up

there to get a drink with Danny. We went up there to go have a good time. Danny Sanders says they knew I worked out of town. Okay. Maybe that's not material. Maybe that, maybe the fact that they lied about that, that doesn't, that doesn't make any difference, but us look to the next witness, the next two witnesses. Those are over in Radford. Mark Lilly never mentions in either one of his statements, never mentions he goes over to Radford period. Gary Barker said, well, I didn't tell the police about going over to Radford because I didn't want to bring Warren Nolen down, you know, didn't want to get him in trouble, but he's a drug dealer, he's a drug dealer. He doesn't want to bring him down, but boy he's willing to bring him down when he get's up on the stand. Now, let's look at Patricia Quesenberry and Warren Nolen. Let's see what is, what in their testimony? We know that they came over and they're drinking. We know that Mark [1253] Lilly dumps the coins out and Mark Lilly grabs up what appears to be a gold money clip and Warren Nolen said it was some kind of coin in it. Where did we find it? Down on Whitethorne Landing. Mark Lilly says he never got out of the car. Now, continue on. What else did they tell you about them? Look, we didn't want, we didn't want, normally we would invite Ben to stay the night, but we didn't want to invite him to stay the night because the way they were acting. What were they saying? What was Gary saying? Well, hey, you know, none of them have licenses. If the police try to pull me over, I'm going to take a shot at them. I'll shoot somebody who tries to stop me period. Made them feel uncomfortable about the whole thing. Now, they may, Mr. Schwab may get up and argue and say, well, we know Warren Nolen had some

drug convictions, but he's getting two drug tests per month and we know that he's gotten his license back. He was an habitual offender and he's got a restricted license. We asked him about it Patricia Quesenberry, is she a convicted felon? No. You didn't hear any evidence of that. She'd done any drugs? No, no evidence of that. [1254] She says, what, what occurred? Well, they were sitting around and they were drinking. Gary Barker jumps up off of the couch. The next witness, A. J. Fall. I don't know Ben Lilly he tells you. Didn't know Ben Lilly until he was introduced to me that night. Gary and Mark introduced him. They were renting a room from him. Gary and Mark were renting a bedroom from A. J. Fall. A. J. says we were drinking that night. We were drinking throughout the entire night. They were giving me the liquor that was stolen from over in Floyd and we were drinking pretty hard. Sometimes, well, there for a while he was saying a little bit and, but he kept saying they drank a little bit more, a little more and a little bit more throughout the course of the evening. But one thing he said, now, he doesn't know Ben Lilly, but he says, Ben Lilly never touched those guns. He knows Gary Barker. He knows Mark Lilly. Ben Lilly didn't touch those guns. You, you listen to Gary Barker, oh, yeah, we, he was handling those guns. Boy, he was, he had those guns . So, we can't, I guess we can't believe A. J. Fall either. Let's continue on. We, A. J. says we're going through [1255] the course of the evening and get up the next morning and see them off and who takes out the guns? Was it Ben Lilly? No. Ben Lilly didn't touch the guns, carry them out. The next witness we hear from, Joyce Lang and Michael Lang. Joyce Lang says they came up to her house

and she says they came up in the car and that was the car that she identified. Michael Lang says, well, I think they walked up. I'm not sure. I think they came walking up on that date. Now, Gary Barker says Ben Lilly never left us. We never left him. We were all together at all times period. We never had an opportunity to go spend any of the Two Hundred ($200.00) Dollars that Warren Nolen had paid him. They were together and you heard Warren Nolen say, well, I was expecting him to come back the next day to do some work. That's one of the reasons we talked about letting him spend the night, but they said they were going to take him on home. Get over there and Joyce Lang says, hey, Mike, you're not going with them. You're not going with them. They look like, you know, you've been in enough trouble and what does Gary Barker say, hey, don't worry about it. I'd just soon [1256] kill my own beat friend. She says no way you're going with them. She made a very good decision. Michael Lang gets up and he says, yeah, I was in some classes with him. I was in special ed and nger [sic] control classes with him. He said that I knew him. But that, you know, that he'd always put the blame on him. Mr. Schwab has already referred to that, and Mr. Schwab says, well, he's taken the blame for this. He's taken the blame. Let's see. Is he taking the blame when he tells Mr. Barnett or told you, this is a question now, did he tell the police the truth or did he tell you the truth? When he told you, no, I, I didn't point it at Howard Barnett. Hey, I was waving the gun around, but I never pointed it at him. Was he lying to you, or to you when he got up and he, he said, no, I didn't put that gun to Bill Williams' head? No, I didn't do that. I, no, I, I, yeah, I took the oath, but, no, I didn't do

that. No, I, I didn't put the gun to his head and tell him I'd blow his damn head off. Let's look at our next witness. A. J. Fall again. A. J. says they showed him the dead goose and they, they're going up and he described a, a neighbor who is a little [1257] bit cankerous and that there became an argument between Gary and Mark and the neighbor and what do we see Mark Lilly doing? Pulling out the gun and pulling the hammer back. A. J. says, no, no, no, no. No actually he didn't say anything. He just pointed his finger like that (describing). That stopped him. They got in the car the last time, they left. What else do we know about A. J.? He said that that wasn't the shirt that he was wearing. That was not the shirt that Gary Barker was wearing when I saw him at the end of the day. He was wearing a T-shirt. Gary Barker says they never went back to the trailer again. Where's the T-shirt that Gary Barker was wearing? But where is the T-shirt. Next witness we've got according to Gary Barker, I guess Ron Lucas is another drug dealer because they were going over to trade the, the guns for drugs. Ron Lucas goes to, to the police at 7:00 the next morning to report what he saw. 7:00 the next morning. is that what drug dealers do? Get up at 7:00 in the morning and go? Use your commonsense. Is this what a drug dealer does? Goes up and says, hey, look, this is what happened. Mark Lilly, [1258] he came in, he wanted to sell me a gun. I said, Mark, is it hot? And he says, oh, it's a little bit warm. He says I'm not interested, put the gun away. What do we see? Gary Barker comes out pulling out a gun and what does Ben Lilly do? Ben Lilly grabs the gun away and puts it in the trunk and says, put the damn gun away. And we told you that Ben Lilly grabbed that gun

and he, he was in that car and, and he's guilty of possession of a firearm after being convicted of a felony. There is no doubt about that and Mr. Schwab got up and said you can fill out the top one, you can. You can put that one aside. Now, we get down to Whitethorne Landing. No other witnesses. We don't have any other witnesses. Mr. Schwab referred to it he wished he had a, a video tape and so, I, I don't wish we had a video camera down there. I wish we never heard of Whitethorne Landing. I wish we were never here. I wish Alexander Defilippis was in, going to school and going on with his, his life, but that, that's not what happened. But let's, let's talk about, first of all, Mark Lilly shouldn't have never got out of the car period. Never got out of the car. Ben [1259] Lilly gets in and out of the car. Let me, let me take a step back. I, I definitely forgot about Price's Fork. Gary Barker says the car breaks down and I had to remember, I asked him, I said, do you recall telling Officer Price that Ben Lilly was way down the road? And he said, and after I showed it to him he says, well, I must have said, but I don't recall it. Gary Price was the first one to interview him. Ben Lilly is way down the road. Now, and then he gets up and testifies he didn't know where we were going. Ditch these guns in the ditch. We're going to throw them in the ditch and Ben says he's going to get me a car or get us a car and he asks for Mark, for the gun, and he goes over and Alexander Defilippis throws a Twenty ($20.00) Dollar bill at him. We've heard from Alexander Defilippis' friend that he didn't carry more than Ten ($10. 00) at any point in time. That he just wasn't the type, that he didn't carry a lot of money, so and Alexander Defilippis according to Mark Lilly throws the money out and Ben 5 makes

him get in the car. He says, yeah, we were, it was dark. We made sure that, that we got in the car He [1260] didn't see our face. And y'all recall, I asked, I, I showed him that picture. I said, what are, what are these things around the, the Hethwood Express? Are these lights I see? I pointed them out to him. I said, it's well lit up there, isn't it? I said what's that? And he said, that's, that's a light. I said, what's that? He said that's a night light. I said, what are those? He said those are lights. What's that back there? It's a flood light, but, no, he didn't see our face. It was dark. He didn't see my face. It's important. Now, again, I asked him, I asked him, I said, did you tell Howard Barnett to hide his face, to cover his face? No, I didn't tell Howard Barnett that no, no, I didn't do that, no. Howard Barnett gets up and he says, yeah, he told me he had that gun and, and I, I'm not sure if that's the gun. I was pretty scared, but he told me to hide my face and you better believe I did it. I may have been a little bit slow of getting down on the floor, but he, I did exactly what he said. So, they get in the car. Gary Barker's story. Mark Lilly's first story. Mark Lilly says we were going across the parking lot and Ben [1261] pulled the gun. Not Ben got the gun from me, but Ben pulled the gun and robbed, got Alexander Defilippis. No mention of the Twenty ($20.00) Dollar bill. No mention of the wallet. No mention of any of those things. Second story. Me and Gary were back at the car when Ben Lilly did this. We were way back at the car and Ben Lilly did all this. So, we got story Number One (1), story Number Two (2) or story Number Three (3). You can pick according to that who is doing the robbery and when. You can decide. Are those consistent stories? Are those stories that you can believe

beyond a reasonable doubt? Now, next step. They start going down the road. Mark Lilly says we're not talking about anything. Well, no, nothing was really said. Gary Barker goes on to, in some conversations and says they were talking. Not a big significance. Maybe that's one of those immaterial facts that Mr. Schwab has been talking about. They get down to the Whitethorne Landing and they get down there and Gary Barker, I mean Gary Barker says, well, we got out of the car and Ben stripped him and I thought it was funny. Now, you heard me ask him the question. Let me get this [1262] right. Alexander Defilippis has been abducted, his car has been taken, he's been robbed according to their testimony, and he's been stripped down to his underwear and his socks, and he thought that was funny and he said, yeah. You heard his testimony. Do any of you think that's funny? Now, let's look, now, Mark Lilly says we never got out of the car. Gary Barker says, well, we let him go and at that point in time we got back in the car and he says Ben came up and you were, you were here all of you. I get real close to Gary Barker, I said at point blank range, right, this close? And he said if not closer. Closer than three (3) feet. What does Mark Lilly say? Mark Lilly says in his statements, the officer asked him, he says, well, how far away was Ben Lilly when he shot Alexander DeFilippis and he says from here to those dudes and Gary Barker, I mean, Gary Price says, is that ten or fifteen feet and he says, no, it's more like ten or fifteen yards. That's thirty to forty-five feet. Closer than three feet or, could you hold on to that for me for just a second, (using measuring tape) , twenty-five feet, immaterial fact. Doesn't really [1263] matter. Would you let that go (measuring tape). immaterial. You

heard Gary Barker say at point blank range. You heard Dr. Oxley say if it was within twenty four inches, you're going to have powder burns. After that, it's, it may or may not be. Point blank range. Gary Barker says, well, we got in the car and Ben says, you, and I, I watched every single one of you and when he testified to this and it, it shocks me. He said that Ben said, give me a fucking beer, and everyone of you, I, just went back for a second. We've been talking about liquor and drinking liquor. First mention of beer. When did they get beer? When Ben goes to buy it in McCoy. Is there any evidence before you before then that they had anything other than liquor? Now, Mark Lilly says Ben didn't say anything. As a matter of fact I asked him, what did Ben say? What did Ben say? They asked him three or four times and finally Mark Lilly at the end of his second statement to Officer Hamlin, he says, I think he said, the guy was dead and he uses some explanation words and I don't see the need to use it at this point in time and Gary Barker says, said that, and he said, oh, he [1264] said the reason he had seen my face, he'd seen my face and that he didn't want to go back to the pen and that's why I did it. Mark Lilly says he didn't really talk about anything. Nothing. Nothing significant. I'm, I'm sure everyone of you remembered, give me a fucking beer. Mark Lilly can't remember that. So, they go to McCoy. Ben is the only one that goes in and who, who goes in and there they go, they go in there, does Ben have a gun? Does Ben rob any place? Ben's buying the beer and buying a case of beer. Go back and they get in the car. At that point in time, we know Ben's with them. There is no doubt about that. They got back into the car then they head over to Eggleston and

they drive around those roads and they come up on Howard and Louise Barnett and we've already touched on it. Now, you heard that Ben Lilly took the knife and I told you in the opening that Ben Lilly took the knife out of his hands and he threw it nine feet forward in the air, nine, ten to twelve feet forward in, into that little, little grocery store, but he had gotten Mrs. Barnett back away from where Gary Barker was. You heard Mrs. Barnett say that he went back [1265] to the beer coolers and they got the beer out and they took the beer to the front, front cashier. You heard Gary Barker tell you that Mark Lilly cleaned out the cash register. Louise Barnett couldn't tell you and Howard Barnett couldn't tell you either because he, he had his face down which nobody can blame him for. Mark Lilly is going to tell you that Ben Lilly gave him the cash. Ben Lilly gave him the money at, from the back. Gary Barker says, well, we got it and we divided it up, but who has the food stamps in their possession? Whose got the food stamps? We know those come from the robbery without a doubt. And whose got them? Gary Barker. Now, we get to the next store. What have we got? We go to the Pembroke store. There's a big plate glass window. They go into the store, they're robbed. Gary Barker looked at you and he didn't tell, he didn't mention to the police that he had told this man that he'd pull, blow his fucking head off and according to Mona Hylton, he pulled the hammer back. Mr. Schwab said, well, he didn't fire the gun in the store, did he? No, that was the response of all the witnesses, no, Gary Barker didn't fire the gun. It took [1266] three (3) shots to kill Alexander Defilippis. You notice whose only got two (2) shots left. Every place that they stop at has got two (2) people. Now,

let's talk about Gary Barker a little bit more and you've heard Mr. Jenkins talk about it and all of y'all saw Gary Barker testify. First, he denied he was a convicted felon. It turned out he'd been convicted of ten (10). It turned out –

MR. SCHWAB: Objection, Your Honor. It was a misdemeanor offense.

THE COURT: That –

MR. TUCK: No, I, Your Honor, I asked him –

MR. SCHWAB: It was a misdemeanor offense, Your Honor.

MR. TUCK: Your Honor, if I recall the evidence, I asked him how many felonies have you been convicted of and he said none. And I said, none. And I said what about the eight (8) that you have been convicted of regarding these charges? And he said, oh, yeah, those. And that was as I recall the testimony. [1267] Now, I may be mistaken. Now, he also denied being convicted of a misdemeanor, which the Court put in, I mean the defense put into the record, but I did, do recall asking that question and I would like to be able to argue that point.

THE COURT: All right.

MR. SCHWAB: I'll withdraw my objection.

THE COURT: All right, sir. Go ahead.

MR. TUCK: And we're going through and we're sitting there and each one of you, you, each one of you saw Gary Barker testify, and at first, he denied that he'd been convicted of any felonies. And I said what about these eight (8)? And he says, oh, yeah. And I said

what about the two (2) that you went to Court for this morning. He said, oh, yeah, those two (2). Was he lying to the police or was he lying to you? Was he lying to you under oath? Now, Gary Barker mentions that we made real certain that Alexander Defilippis didn't see our face, me and Mark. We made certain of that. We had him cover his eyes and you've heard Gary Barker say that he could see what was taking place when Ben Lilly shot [1268] him. You heard that. And he wants you to believe that, no, he couldn't see my face on that moonlit night, with the fog lights on that I could see that far down the road. He doesn't, he, oh, no, he couldn't see our face. No, it wasn't important. No, I didn't say that to Howard Barnett. It's for you to believe or not believe. That's the decision that you've got to, that you're going to have to make. Now, I'm not saying that your job is easy and I, I wouldn't want to be in your shoes, but when you go, go back there, you're going to have to follow those instructions and you're going to have to wade through the evidence and now one of the other things that may come up is, well, how did Ben Lilly got the knife that came from Floyd County? How did he get this money clip? How did he get some of those coins? I don't know, but he had Two Hundred ($200.00) Dollars when Warren Nolen met with him. He's got Ninety-five (95) when he gets stopped and Howard and Louise Barnett lost Four Hundred and Twenty-five ($425.00) Dollars. When they all three (3) are stopped, I believe Mark Lilly was, the inventory said he had a Hundred and Twenty-nine (129) and some food stamps, Gary [1269] Barker had Ninety-seven (97) and Ben Lilly had Ninety-five (95). Mark and Gary said we divided it evenly. That doesn't exactly sound

even. It would be fairly close between Mark and Ben I can see, but not between, excuse me, fairly close between Gary and Ben I could concede, but not with Mark. They were riding around all day. They didn't, Gary Barker didn't say they ate anything. Commonsense. The Judge is going to tell you, use your commonsense. Do you think they eat some place? And now Mark Lilly says one time, hey, I wouldn't do something like that. I wouldn't take a twelve (12) pack of beer. I had money in my wallet. The next time he says, we were broke. It depends on whether you want to believe him or not, but we know according to Warren Nolen that he had just paid Ben Lilly Two Hundred ($200.00) Dollars, and the last point I want to talk to you about is, well, the last few points, looking at, we know and Doug Maynard said in, in and you've got a certificate as one evidence that they tested this firearm for fingerprints and they tested it for ballistics, as well, and that this was worked up before he had an opportunity [1270] to see it in November and you're going to hear that there were no fingerprints on the gun. You also heard evidence that Gary Barker had gloves on. You also heard evidence that where the blue sweatshirt that Mark was described with carrying that, that Alfred Falls told you about that he was, that he had. You are going to hear that there were a pair of gloves found there, but when Ben Lilly's taken in, the only gloves that are around them are the gloves that were, come from the store and there's not a half eaten Granola Bar, there's a half eaten Beef Jerky. Now, going back to that car scene, we know that Ben Lilly told them that he was a secret agent or an agent for Montgomery County Sheriff's Department. And, obviously, that was not the truth and he did say that there

were people up in the woods with assault rifles and that wasn't the truth. And I ask you to use your commonsense and those are the type things that, that a drunk would say. Are those the type of things that someone sober would say? I'm a secret or I'm an agent with the Montgomery Sheriff's Department. Now, you also heard Bill Whitsett say and you heard him testify, I know what [1271] I heard and I, that's it. I, I guarantee I know and I heard him say me. Then on cross-examining, you heard him say, well, that, I think I heard him say me in December. In February, he said he wanted to confirm it and that's why he went back to ask him the question, but now it's definite without a doubt and you also saw me ask him if he remembered giving a statement to Gary Price and he says, well, I may or I may not have, and then he said, well, it's got the exact, it's the same content. Maybe not the exact same words, but it's the same content. Is, do you believe that beyond a reasonable doubt? And what is reasonable doubt? I asked many of you during the voir dire process, Mr. Jenkins and I, we switched back and forth and is it, is it probable cause, which is the lowest evidentiary standard we have, or is it preponderance of the evidence, more likely than not, or is it clear and convincing evidence, or is it beyond a reasonable doubt? A reasonable doubt. Now, those are the things that you're going to have to do and you've got a tough job and I'm not envious of your position in any way, shape or form. I leave you with this. Mr. Schwab, [1272] gets the last word because the Commonwealth has the burden. When he starts raising arguments, I want you to ask yourself. What would Mr. Jenkins say to that argument? What would Mr.

Tuck? What piece of evidence would he point to? Thank you.

THE COURT: Thank you, Mr. Tuck.

CLOSING STATEMENT BY MR. SCHWAB

Actually, Ladies and Gentlemen, I prefer that you ask yourself. Not what Mr. Jenkins would say. Not what Mr. Tuck would say, but what the evidence says. You don't have to believe me. You don't have to take my word for it. You take your word for it. You don't take what Mr. Jenkins might tell you or what Mr. Tuck might tell you. Take what the evidence is. Now, let's talk about what they've told you. You've listened to them. What are you supposed to believe? Who can we believe? Were Mark Lilly and Gary Barker not even there? Did they not rob the places in Giles? Did they not have the guns? Did they not break in in Floyd? Well, they have been lying about everything. How can they be telling the truth about that? No, you've got to go back to what we

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[1275] from the wrong direction where they came from, when they turn off their lights in the street, when they pull into the darkest part, and Ben, he was just going in to buy beer. Do you believe that? Do you believe Mr. Tuck is the only one in this Courtroom that doesn't know how Ben got the things from Floyd? You know exactly how he got them from Floyd. And you know exactly what he did in Mrs. Barnett's store. You're going to have to sort through all of this. And, I'm sorry. It's difficult. And you're going to have to sort through every piece, but you can't take, if, if Gary Barker's a liar that can't be believed,

then he didn't have anything to do with this. And if Mark Lilly is a liar who can't be believed, he didn't have anything to do with this. You can't do that. He's dead. Alexander is dead. Somebody had something to do with it. And they want, well, who did it? How did it get done? if they're such liars that you can't believe anything, then this is all an illusion. You've got a job. You've got to resolve the convicts [sic] in the evidence. You're going to have to sit down there and put those pieces together. There are very few people that told you [1276] the absolute, absolute truth about any set of events because of the problems you have with the gun and everything else. And there is some that are going to lie to you and there's some going to leave parts out, but there's truth in here some place. They talked about uncorroborated accomplice testimony. Uncorroborated. Let's see. We were in Ben's old car and it broke down and then the place was right over there and we went and got it. Well, Ben's old car is there. We fired the shotgun that day. We fired the deer rifle that day and we fired the pistol that day. There were five rounds in the pistol. Mr. Lucas can tell you that. We went to Whitethorne. That's where you'll find his body. That's where you'll find his body. That part's corroborated. Who was the only person that tells them where to go find the things that they'd thrown away? Everything that they'd touched. Remember they stopped and they threw the stuff out of the car. They threw his clothes out. They threw Tom's book bag out in the river. They wiped all the stuff down. They broke out the speedometer part. Now, why on earth would he do that? Did Ben forget that? [1277] Where was Ben while all of this was going on? Where was he? That was after Price's Fork.

That was after they bought beer. Ben forget that? This missing T-shirt suddenly. Now, did Gary change when he killed him or did he change when he threw it in the river or did Ben not notice it? Where was Ben during all this? Poor old Ben. You know what this case is, Ladies and Gentlemen? You ever see those nature shows where you've got a big dog and the two young adults or a big wolf and the two young ones and they're going around and the big dog, the big dog is confident, you know. The big dog knows what's going on. He doesn't have to show off. Those two young pups though, whoa, they're jumping up and down. If they're in the neighborhood, they're knocking on the trash cans, and barking at everybody. They're strutting their stuff. What are the two young ones doing and this one during the whole time? Running their mouth, showing off the guns and everything else. Ben is old Mr. Calm. Ben doesn't have to prove anything? Ben's been to the end. You've got the big dog and the two young ones that are running their mouths and what it came down to, and [1278] you heard them both say, they'd never seen nothing like that before. The two young puppies. It didn't bother big dog though, did it? The big dog didn't even know anybody had been killed. The pistol. Mark, I think Mr. Jenkins left out all the times that Mark had the pistol. So, if Mark had the pistol and Gary had the pistol, nobody saw Ben have the pistol, but could have Ben had the pistol? Yes. And if Gary ran with the rifle at the end and the pistol was dropped, well, maybe that was Mark. Does that mean Ben didn't shoot? No. It doesn't mean that at all. That means there's no corroboration as to who had the pistol at the time Alex was shot. That's what that means. Gary Barker started

talking to the police at 9:47. Then he talked to the Blacksburg Police and then he talked to the Montgomery County Police and then he talked to the Floyd County Sheriff's office. You want to talk about fifty-three (53) years? Yes, ma'am and gentlemen, it is the minimum he could have got if he went to trial. Fifty-three (53) years. Boy, did he get off light. Fifty-three (53) years. 1943. That's what fifty-three (53) years is. Fifty-three (53) years ago [1279] was 1943. Fifty-three (53) years from now is the year 2049, so he got one heck of a bargain, didn't he, and he's right where he ought to be. Gary Barker was in this up to his neck. Mark Lilly was in this up to his neck, but only one person pulled that trigger. They talked about Gary wanted to commit suicide and why would he do that? He told you why. He told you why he didn't do it. Because he knew if he did it they'd all blame him. They didn't talk to you about why Ben didn't commit suicide –

MR. TUCK: Your Honor, I object to him pointing the gun at me. I mean that is improper.

MR. JENKINS: Me too, Judge.

THE COURT: Just a minute. Just a minute.

MR. SCHWAB: I'll move it to the other hand, Judge, it was a pointing, it wasn't to point the weapon.

THE COURT: All right. I can only hear one person at a time.

MR. TUCK: Your Honor, I object to having a firearm pointed at me in this, in this type of

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[1281] hell anyway. Now, Warren Nolen and we talked about that. Well, now, you can believe Gary or not no matter what they did in Radford, I mean they were asking him about where the car came from. We broke in a house in Floyd, yeah, we're in Radford. And you can believe or not believe any of that. It really doesn't have anything to do with the case and a little interesting side light is that the offenses Mr. Nolen had been convicted of are possessing stolen goods and distributing drugs. Distributing drugs are not the same as using drugs. Corroborated. Is the testimony of Gary Barker corroborated? And in many, many respects it is. So, in those parts you can know you can believe him. There are hard parts of that part where you don't have the corroboration where there's only three of them. You remember and you have a copy of the Plea Agreement, the commonwealth said we'd give him fifty-three (53) years if he would testify truthfully, and if after he pled guilty, he'd under oath indicate whether or not the statements he had given the police were true. in other words, Gary Barker could have got up here after he pled guilty and [1282] said, I lied, I did it. I lied, Mark did it, and there was nothing we could have done. It's in there and it's in there that way for a reason. He could have said whatever he wanted after he pled guilty. He still had fifty-three (53) years, he still agreed to truthfully, testify truthfully and I might have been left with egg on my face, but he was going to testify truthfully the best I could prepare and if that was not having testified, because he said, no, I was the one that did it. Mark, yeah, they were all in on it. They were all in it, on it anyway. They were all down there. They can say they got in the car. Didn't get out of the car. They were all

in it. We know that. Floyd. What difference does it make if Mark knew the guy or didn't know the guy? The house was broken into and the stuff was stolen and Mark said that. Gary said that. Does it make any difference in when you're looking for the kernel of truth whether or not Mark admitted he knew the guy whose house they broke in? What difference does it make? His stuff is still right here. It's still gone from his house. Does it make Mark less guilty or more guilty? Or just that you [1283] can't believe everything he says? So you're going to have to look at it. We know he was shot from a distance of more than twenty-five (25) feet. The tape measure was very nice, but you remember on the tape what you heard? How far away were they Investigator Price? As far as those people, from me to you. Investigator Price, ten to fifteen feet. Mark goes, no, ten or fifteen yards. Well, those people were no farther away when Investigator Price asked him then when he answered, so maybe Mark's not real good with distances. And you know what, how close you got to be? How close do you have to be? You saw the blood trail. Here (pointing). The paint starts there and it goes over to there (pointing), so they could have been at different distances and where was he hit? Right to left, through the lip. Left to right, through the back of the neck, and then right here (pointing). Could there have been different distances and if he was close enough to hit him with the gun, with the bullets, what difference does it make if it was four feet, or twenty-five feet or fifty feet? It was close. It had to be close. It had to be close to hit him that many times [1284] in the head over that short a distance and the fact of the matter is, he was shot whether Mark says it was thirty

feet or fifteen feet or fifteen yards or Gary says it was point blank or a little ways away or whatever. He's dead. He was shot. Is he not shot because Mark said fifteen yards? No. Is he not dead because Gary said they were up close? Well, that, you know, if he said he was up close, then I don't guess he's dead, right? What are you going to believe? Yeah, Ben said, give me a fucking beer. And what's the first thing they did. They all three agree on that. They went down the road, you heard the deputy talk about the distance. It was about five minutes at the most from Whitethorne to that little store and what's the first thing they did? Take that money they had and go in and buy a case of beer and cigarettes. Big dog needed a beer. It made him thirsty. Didn't have to rob them because they hadn't figured out they had, needed to dump everything and take off to West Virginia. Even Ben said they were going to West Virginia. Remember? That's why he wanted to get some more beer, so he wouldn't have to keep stopping and I'm [1285] still trying to figure out what Ben did with that money he left for the Barnetts. Remember? Oh, I dropped some money on the counter. So, what do you think Mr. Jenkins and Mr. Tuck would say about Mrs. Barnett's testimony? It still comes down to who you believe and what you believe. Yes, two of them had gloves, and Ben didn't have on glove. They also stopped and threw all the stuff out. Now, we knew they threw the things out. They even threw out a sun visor and the part that goes over the speedometer, so maybe the reason they did that was because they were afraid they may have left fingerprints on it. So, maybe they wiped the gun. Or maybe because the people who had it after that had gloves on, so that would have wiped it off.

Or maybe as Mr. Maynard indicated, you don't always find prints. Well, let's talk about something else to do with their hands. Who told the police they hadn't fired a gun that day? Why would Gary lie about Ben shooting a gun earlier that day with the goose? Now, you really think Gary's that smart that he can put it all the way back down there when he doesn't even know they asked Ben to take a gun shot [1286] residue test until 4:00 in the morning? Ben fire a gun that day? Are you going to believe Gary on that? A shotgun was fired. The shell was in the car. The rifle was fired. The shell was in the car. The pistol was fired. The shell was in the car. Even Mark didn't think it was important enough to lie about it. Yeah, I shot the gun earlier. Yeah, I'll let you do a residue test. Yeah, they didn't send them in. What was it going to show? They had fired a gun. They had already said they had fired a gun. Did they say what gun or when? No. The tests wouldn't tell you that. Just they fired a gun. What did he do? What did he do when they asked? They'd asked him on tape. You heard it. I haven't fired a gun. Not me. Did you take one? Evidence Technician Skidmore, all the way to the magistrate's office, rubbing his hands on his pants. He did that for the same reason he knew he was going to hell. He killed Alex Defilippis.

THE COURT: Thank you, Mr. Schwab.

THE COURT: Ladies and Gentlemen of the jury, originally at the beginning of this proceeding, because of the anticipated length of the trial, the Court

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[1611] things you wanted to tell the Court.

A. Sure.

Q. What is it that you want to tell the Court today?

A. Well, in some of the statements that me and Mr. Barker, Gary, give the cops and some of Gary's testimony from what I understand, it ain't really what happened.

Q. What specifically isn't really what happened?

A. Well, like the robbery, I said that –

Q. Which robbery? There were three that night.

A. Well, all three of them. One of the, in the statements and in Gary's testimony when he testified that it was Ben, he said that, ah, Ben was going to rob the boy. Ben never did because I did. I took Twenty-one ($21.00) Dollars off of him.

Q. So you lied to the police that night?

A. Yeah.

Q. How do we know that you're not lying now?

[1612] A. You tell me. I'm telling the truth now. You know, at the time, I was scared. The investigator started talking all these life sentences, you know, I could get and I got scared man. Throw it off on somebody else.

Q. In there anything else you want to tell the Court?

A. Us see. Not that I can think of.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: Yes, sir.

Q. Did you, you told the police that you saw your brother kill Alexander Defilippis, is that correct?

A. Yeah, that's what I had said, but I, I can't say that for sure. I can't say for sure who killed him, you know, either party. I can't say for sure.

Q. Why's that?

A. Because at the time of the shooting, I was on the other side of the car throwing up all the liquor and beer that I had been drinking throughout the day.

Q. Now, you told the police that you never [1613] exited the vehicle down at Whitethorne Landing. Did you lie then?

A. Yeah. Everything I told the cops I lied.

Q. You are aware that they placed that statement that you gave to the police before the jury, in that correct?

A. Yeah.

Q. And you did nothing to come forward at that point in time?

A. Right.

Q. And why in that?

A. I hadn't been to Court yet.

Q. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. So, everything you told the police was a lie?

A. Yeah.

[1614] Q. So you did kill him, is that what you're saying?

A. Ah, –

Q. You told the police you didn't kill him, so if you lied about everything, then you must have killed?

A. I never killed him.

Q. Who killed him?

A. I don't know. I can't say for sure who killed him.

Q. Who had the pistol?

A. At the time of the murder? I can't say for sure because I don't know.

Q. Did you have the pistol before the murder?

A. No.

Q. Who had the pistol?

A. I can't say for sure, you know, because I do not know.

Q. You don't know?

A. Right.

Q. You had the pistol up till the time you

• • •

[1618] Q. Did anybody in your family encourage you to call Mr. Tuck?

A. Huh-uh.

Q. Does it have anything do to with your being here today that there's a custody petition concerning your child pending in the J & D Court?

A. I don't see where my kid has anything to do with it while we are here now.

Q. Well, that's my point. Does it or doesn't it? You didn't call Mr. Tuck until after your mother filed to have custody of your child?

A. That ain't got nothing to do with it, man.

Q. Why do you blame it on Gary Barker instead of your brother?

A. Well, me and Gary we, we've been, we've been in a whole lot of trouble together and Gary knows a whole lot on me and if it was to do over, I wouldn't have told y'all nothing, you know. I wouldn't told y'all nothing. I would have took the Fifth.

Q. So, you don't know that your brother didn't kill him, do you?

• • •

(Filed 10-25-96)

What is the legal definition of "circumferential evidence"?

~~Principal in the~~ second degree to

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY:

COMMONWEALTH OF VIRGINIA

V.

ORDER NO.

BENJAMIN LEE LILLY

Defendant

SS#: 230-96-7040

DOB: 2-29-68

RACE: W

DATE OF OFFENSE(S) DECEMBER 5, 1995

This day came the Attorney for the Commonwealth and the defendant, BENJAMIN LEE LILLY, age 28, who stands convicted of nine (9) felonies to wit:

1. Capital Murder
2. Use of a Firearm in Capital murder
3. Abduction
4. Use of a Firearm in Abduction
5. Carjacking
6. Use of a Firearm in Carjacking
7. Robbery
8. Use of a Firearm in Robbery
9. Possession of a Firearm after having been convicted of a felony

appeared before the bar of this Court in the custody of the sheriff, and came also Christopher A. Tuck and Max

Jenkins, Attorneys-at-law, heretofore appointed by the court to represent the defendant.

Whereupon the accused, who had previously been arraigned and after private consultation with his attorneys plead NOT GUILTY to indictments 1 through 9, which pleas were tendered by the accused in person, requested trial by jury, on all Indictments.

A Jury panel was then summoned and the voir dire of said panel commenced.

Due to the lateness of the hour, Court was adjourned until the following morning, October 16, 1996 at 9:00 a.m.

On October 16, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury panel from the previous day, voir dire continued.

Due to the lateness of the hour, Court was adjourned until the following morning, October 17, 1996 at 9:00 a.m.

On October 17, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury panel from the previous day, voir dire continued.

Due to the lateness of the hour, Court was adjourned until the following morning, October 18, 1996 at 9:00 a.m.

On October 18, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the Sheriff, and came also his Attorneys and the jury panel from the previous day and voir dire continued and was completed.

The Court then impaneled twenty four (24) qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the Attorneys for the defendant each alternately exercised their rights to strike the names of five (5) veniremen from the panel, as provided by law, and the remaining twelve (12), including two (2) alternates, constituting the jury for the trial of the defendant, were duly sworn.

Due to the lateness of the hour, Court was adjourned until the following Monday October 21, 1996 at 9:00 a.m.

On October 21, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury.

After opening statements, the evidence began to be presented by the Commonwealth.

Due to the lateness of the hour, Court was adjourned until the following morning, October 22, 1996 at 9:00 a.m.

On October 22, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Commonwealth continued to put on her evidence.

Due to the lateness of the hour, Court was adjourned until the following morning, October 23, 1996 at 9:00 a.m.

On October 23, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Commonwealth continued to put on her evidence, then rested.

Due to the lateness of the hour, Court was adjourned until the following morning, October 24, 1996 at 9:00 a. m.

On October 24, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Defendant began to introduce his evidence and rested.

Due to the lateness of the hour, Court was adjourned until the following morning, October 25, 1996 at 10:00 a.m.

October 25, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury.

After hearing the evidence, the instructions of the court and argument of counsel, the two alternates were separated from the jury. The jurors were then sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We, the jury, find the defendant, BENJAMIN LEE LILLY Guilty of capital murder.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, Guilty of use of a firearm in the commission of murder.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, Guilty of abduction.

Signed: Michael W. Hyer, Foreman."

"We the jury, find the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of abduction.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of carjacking.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of carjacking.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of robbery.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY guilty of use of a firearm in the commission of robbery.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY guilty of possessing a firearm after having been convicted of a felony.

Signed: Michael W. Hyer, Foreman."

Due the lateness of the hour, Court was adjourned until Monday morning October 28, 1996 at 9:00 a.m.

On October 28, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the

sheriff, and came also his Attorneys, the jury and the same two alternates.

The Attorney for the Commonwealth and the defendant were given the opportunity to present any additional information prior to fixing punishment for the felony convictions.

After hearing the evidence, the instructions of the Court and argument of counsel, the two alternates were separated from the jury. The jurors were then sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We, the jury on the issue joined, having found Benjamin Lee Lilly guilty of the capital murder of Alexander V. Defilippis during the commission of a robbery while armed with a deadly weapon, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuous serious threat to society and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed: Michael W. Hyer, Foreman."

"We, the Jury, having found the defendant, BENJAMIN LEE LILLY guilty of use of a firearm in the

commission of murder fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the Jury, having found the defendant, BENJAMIN LEE LILLY, guilty of robbery fix his punishment at imprisonment for life.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of robbery fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of abduction fix his punishment at ten (10) years imprisonment.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of abduction fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of carjacking fix his punishment at Imprisonment for life.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the

commission of carjacking fix his punishment at term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of possession of a firearm after having been convicted of a felony fix his punishment at five (5) years imprisonment.

Signed: Michael W. Hyer, Foreman."

On motion of the defendant by counsel, before imposing sentence, the Court directs a Probation officer of this Court to thoroughly investigate and report to the court as provided by law on a date compatible with the court.

The Court certifies that at all times during the trial of the cases, the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The defendant is remanded to jail.

Enter: 28 Oct 1996

/s/ Ray W. Grubbs

Ray W. Grubbs, Judge

ORIGINAL

[LOGO]

Commonwealth of Virginia -
Department of General Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

Western Laboratory
6600 Northside HS Road
Roanoke, VA 24019-2837

January 19, 1996

Tel. No.: (540) 561-6600
Fax: (540) 561-6608
TDD/Voice: (804) 786-6152

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

FS Lab #W95-9074

Your Case: 95-5972

Victim(s): DEFLIPPIS, Alexander

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet

Date Received: 12/28/95

(Filed Oct. 4, 1996)

Item 2 Colt brand .38 Special caliber revolver
Item 18 Fingerprints of Benjamin Lilly
Item 19 Fingerprints of Mark A. Lilly
Item 20 Fingerprints of Gary W. Barker

RESULTS

No latent prints of value for identification purposes are present or were developed on Item 2.

The evidence will be available at the Western Laboratory after you have received the results of all requested exams.

Attest: I certify that I performed the above analysis or examination as an employee of and in a laboratory operated by the Division of Forensic Science, and that the above is an accurate record of the results of that analysis or examination.

/s/ Andrew P. Johnson
Andrew P. Johnson
Forensic Scientist

APJ/mdl

VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA	*PLEA AGREEMENT*
	Case No. CR960136-37-00 thru -07
Plaintiff	
v.	Judge: Ray W. Grubbs
GARY WAYNE BARKER	
Defendant	

This PLEA AGREEMENT is entered into between the Defendant, GARY WAYNE BARKER, his attorneys, JAMES C. TURK, Jr. and FREDERICK M. KELLERMAN, Jr., and the Commonwealth's Attorney or one of his assistants in accordance with Rule 3A:8(c) of the Rules of the Supreme Court of Virginia.

1. Defendant's date of birth is 5/12/76, his age is 20 years, and his Social Security Number is 233-13-3920, and he is the person named in the indictments.

2. Defendant is charged with, and this PLEA AGREEMENT covers, the offense(s) of:

(1) CAPITAL MURDER (Principal in the 2nd Degree);
(2) Use of a Firearm in Capital Murder;
(3) CARJACKING;
(4) Use of a Firearm in Carjacking;
(5) ABDUCTION;
(6) Use of a Firearm in Abduction;

(7) ROBBERY; and
(8) Use of a Firearm in a Robbery.

---

3. Defendant agrees to plead guilty to the above listed eight (8) felony charges, understanding that such pleas are an admission he committed the crimes.

4. The Defendant further agrees NOT to petition the Court for a modification or additional suspension of any sentence imposed in compliance with this PLEA AGREEMENT.

5. The Defendant agrees to testify truthfully, if called as witness, at the trials of Benjamin Lilly and/or Mark Lilly and at the time of the presentation of this PLEA AGREEMENT to the Court he agrees to state, while under oath, whether or not the statements (4) he provided to the police are truthful concerning the events in Montgomery County.

6. Upon Defendant's pleas as set out above, the Commonwealth agrees that the following specific sentence shall be the appropriate disposition of this matter:

> Life in the penitentiary on the charge of MURDER (1st Degree Murder/Capital Murder as a principal in the 2nd Degree);
> 15 years on the charge of CARJACKING;
> 1 year on the charge of ABDUCTION;
> 25 years on the charge of ROBBERY;
> 3 years on each of the four (4) USE OF FIREARM during a felony charges, for a total of 12 years.

The Life sentence is suspended for a period of 75 years on the condition that Defendant shall keep the

peace and be of good behavior and shall comply with the terms of this PLEA AGREEMENT.

The total sentence to serve is 53 years in the penitentiary.

7. It is understood by Defendant that the Court may accept or reject this PLEA AGREEMENT, or postpone its decision to accept or reject it until there has been an opportunity to consider a presentence report of his background and previous criminal history.

8. Defendant understands that if the Court rejects this PLEA AGREEMENT then neither party shall be bound by the agreement and Defendant shall have the right to withdraw his pleas of guilty; that if he does NOT withdraw his pleas the disposition of the case may be less favorable than that provided for by this agreement as the Court may impose any sentence permitted by law for the offenses involved; and that if he does withdraw his pleas, this case will be heard by another judge, unless the parties otherwise agree, and the fact of the pleas entered under this agreement shall not be admissible against him.

9. The Court has not participated in any way in the discussions leading to this PLEA AGREEMENT.

10. Defendant acknowledges and understands that he cannot be promised how much time he may be confined to serve a particular sentence, nor where he will be confined, and, that he will receive credit for any time spent in jail awaiting trial of these charges if such time has not already credited to some other sentence.

11. Defendant understands that, if this agreement is accepted upon his pleas of guilty, he will waive his rights

to a jury trial, to confront his accusers, to not incriminate oneself, to have compulsory process to have evidence and witnesses presented in his behalf, and to appeal the verdict of this Court.

12. Defendant, his counsels, and the Commonwealth's Attorney agree that the written PLEA AGREEMENT contains all the terms of the agreement between them.

13. Defendant acknowledges that he has received a copy of the indictments and discussed them with his attorney; that his attorney has discussed with, and explained to, him the nature of the charges, the elements of the offenses; that he has discussed with his attorney the facts and circumstances of the case, as known to Defendant, and any defenses he may have to the offenses; that each and every particular of this agreement and the effects thereof have been fully explained to him by his counsel; that he has had ample to discuss any defenses to the charges and to decide what his pleas should be; and that he has entered into this agreement freely and voluntarily and without promise of threat from any source, and that he respectfully asks the Court to accept this PLEA AGREEMENT.

ENTERED INTO this 26th day of August, 1996, by and between:

/s/ Gary Wayne Barker
GARY WAYNE BARKER, Defendant

/s/ James C. Turk, Jr.
JAMES C. TURK, Jr.,
Counsel for Defendant

/s/ Frederick M. Kellerman, Jr.,
FREDERICK M. KELLERMAN, Jr.,
Counsel for Defendant

COMMONWEALTH OF VIRGINIA

By: /s/ E. Curtis Schwab, Jr.
E. CURTIS SCHWAB, Jr.
Assistant Commonwealth's Attorney for Montgomery County

The COURT, being of the opinion that Defendants' pleas of guilty and waiver of jury trial are freely and voluntarily made, that he understands the nature of the charges and the consequences of his pleas and the terms of this PLEA AGREEMENT, accepts Defendant's pleas and this PLEA AGREEMENT and its terms this 26 day of August, 1996.

/s/ (illegible)
JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

COMMONWEALTH OF VIRGINIA

V. ORDER NO. 13637

GARY WAYNE BARKER,

Defendant

SS#: 223-13-3290

DOB: 5-12-76

RACE: W SEX: M

DATE OF OFFENSE(S): December 5, 1995

This day came the Attorney for the Commonwealth, and the defendant, GARY WAYNE BARKER, age 20, who stands indicted for eight(8) felonies, to-wit:

1. CAPITAL MURDER, Principal in 2nd Degree;
2. USE OF A FIREARM IN CAPITAL MURDER;
3. CARJACKING;
4. USE OF A FIREARM IN CARJACKING;
5. ABDUCTION;
6. USE OF A FIREARM IN ABDUCTION;
7. ROBBERY;
8. USE OF A FIREARM IN ROBBERY,

appeared before the bar of this court in the custody of the sheriff, and came also, James C. Turk, Jr. and Frederick M. Kellerman, Jr., attorneys-at-law, heretofore appointed by the Court to represent him.

Whereupon the accused was arraigned and after consultation with and being advised by his attorneys, pleaded NOT GUILTY to the indictments, which pleas were tendered by the accused in person, who requested trial by jury.

The Court then impaneled twenty (20) qualified jurors, free from exception for the trial of the defendant.

Whereupon, during the voir dire of the jury, the defendant, by counsel, advised the Court that he wanted to change his plea to GUILTY on all the charges, and no longer desired a trial by jury, and moved the court for addtional [sic] time for the possibility of a plea agreement in these cases, which motion the Court granted, the jury panel was dismissed, and Court was adjourned until one o'clock p.m.

The Court having made inquiry and being of the opinion that the accused fully understood the nature and effect of his pleas and of the penalties that may be imposed upon his conviction and of the waiver of trial by jury and of appeal, and finding that the pleas were voluntarily and intelligently made, proceeded to hear and determine these cases without the intervention of a jury, as provided by law.

The evidence having been submitted to the Court in the form of an oral statement by the Attorney for the Commonwealth following which counsel for the defendant agreed and stipulated that such statement accurately reflected all of the evidence which would be presented by the witnesses if they were called in person.

The Court having been advised by the defendant, his counsel, and the Attorney for the Commonwealth that there has been a plea agreement in these cases, and such agreement in writing having been presented to the Court and now filed herein, the Court accepts said agreement and the pleas of guilty to the indictments by the defendant and finds the defendant GUILTY of all the indictments named above, in accordance with the aforementioned plea agreement, and fixes his punishment at:

1. CAPITAL MURDER, Principal in the 2nd Degree – LIFE IN THE PENITENTIARY;
2. CARJACKING – 15 YEARS IN THE PENITENTIARY;
3. ABDUCTION – 1 YEAR IN THE PENITENTIARY;
4. ROBBERY – 25 YEARS IN THE PENITENTIARY;
5. USE OF A FIREARM DURING A FELONY (4) – 3 YEARS EACH IN THE PENITENTIARY, FOR A TOTAL OF 12 YEARS.

Thereafter, the defendant was placed under oath and shown 4 documents which he identified as transcripts of his interviews with law enforcement officers. Defendant then stated, in response to questions from the Commonwealth's Attorney, that the transcripts were correct and that his statements in the transcripts concerning the events in Montgomery County were true.

It being demanded of the defendant if anything for himself he knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is

accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary as listed above.

The Court, however, deemed it compatible with the public interest so to do, the LIFE SENTENCE is suspended for a period of 75 years upon condition of his good behavior, and upon condition that said defendant pay the costs assessed against him with judgment rate of interest until paid in full.

It is further ordered that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the jail of this County to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

And it is further ordered that, pursuant to §§19.2-310.2 and 19.2-310.3 (DNA) and/or §§18.2-346.1 and 18.2-62 (HIV) of the Code of Virginia, the defendant shall have a sample of blood taken for analysis and shall be responsible for all fees and costs related thereto. The Sheriff shall forthwith take charge of the defendant for the withdrawal of the sample in accordance with the procedures set forth in Article 1.1 of Chapter 18 of Title 19.2 of the Code of Virginia.

The Court certifies that at all times during the trial of these cases, the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The Court hereby certifies that the sentence IMPOSED as a result of the convictions shown above total:

53 YEARS IN THE PENITENTIARY.

The LIFE SENTENCE was SUSPENDED for a period of 75 years.

The Court ORDERS that the prisoner be allowed credit for time spent in jail awaiting trial.

And the prisoner is remanded to jail to await transfer to the penitentiary.

Enter: August 26, 1996

/s/ Ray W. Grubbs
Ray. W. Grubbs, Judge.

[Logo] ORIGINAL

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

October 4, 1996

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

Your Case #: 95-5972 FS Lab #W95-9074

Victim(s): DEFLIPPIS, Alexander

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet Date Received: 12/28/95

Item 5 Clothing from Benjamin Lilly
Item 5A Boots from Benjamin Lilly
Item 7A Shoes from Gary Barker
Item 6 Clothing and boots from Mark Lilly
Item 7 Clothing from Gary Barker
Item 30 Blood sample from Alexander Deflippis

Evidence Submitted By: W. B. Tolley Date Received: 09/17/96

Item 36 Blood sample from Benjamin Lilly

RESULTS:

Item 5 The clothing from Benjamin Lilly consisted of two (2) socks, belt, underpants, T-shirt, shirt,

over shirt and jeans. Hairs and/or fibers were recovered collectively from the clothing.

Tests indicated the presence of blood on the bottom right leg of the blue jeans. The sample was extracted for DNA analysis. No amplification results at the HLA DQA1 locus or in the PM system (which includes the LDLR, GYPA, HBGG, D7S8 and GC loci) were obtained for this sample.

No blood was detected on the remaining articles of clothing from Benjamin Lilly.

Item 5A No blood was detected on the boots from Benjamin Lilly. Hairs and/or fibers were recovered.

Item 6 The clothing from Mark Lilly consisted of two (2) socks, underpants, T-shirt, jeans and two (2) boots. Hairs and/or fibers were recovered collectively from the clothing.

No blood was detected on the clothing from Mark Lilly.

Items 7 and 7A The requested examinations were terminated following notification by R. L. Hamlin on October 1, 1996.

Items 30 and 36 Human deoxyribonucleic acid (DNA) was isolated from the blood sample from Alexander Deflippis and Benjamin Lilly. The samples were amplified at the HLA DQA1 locus and in the PM system. No additional analysis was conducted.

No hair/fiber examinations will be conducted following notification by Skip Schwab on October 4, 1996.

The results of other requested examinations were the subject of previous reports. -

The evidence is being retained for personal pickup.

Attest:

[Illegible]

/s/ Patricia J. Taylor
Patricia J. Taylor
Forensic Scientist

PJT

[Logo] ORIGINAL

Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

October 4, 1996

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

Your Case #: 95-5972 FS Lab #W95-9074

Victim(s): DEFLIPPIS, Alexander (Filed Oct. 7, 1996)

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet Date Received: 12/28/95

Item 5 Clothing from Benjamin Lilly
Item 5A Boots from Benjamin Lilly
Item 7A Shoes from Gary Barker
Item 6 Clothing and boots from Mark Lilly
Item 7 Clothing from Gary Barker
Item 30 Blood sample from Alexander Deflippis

Evidence Submitted By: W. B. Tolley Date Received: 09/17/96

Item 36 Blood sample from Benjamin Lilly

RESULTS:

Item 5 The clothing from Benjamin Lilly consisted of two (2) socks, belt, underpants, T-shirt, shirt,

over shirt and jeans. Hairs and/or fibers were recovered collectively from the clothing.

Tests indicated the presence of blood on the bottom right leg of the blue jeans. The sample was extracted for DNA analysis. No amplification results at the HLA DQA1 locus or in the PM system (which includes the LDLR, GYPA, HBGG, D7S8 and GC loci) were obtained for this sample.

No blood was detected on the remaining articles of clothing from Benjamin Lilly.

Montgomery General District
CITY OR COUNTY

General District Court [X] Criminal [ ] Traffic

[ ] Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 01/19/95 DATE did unlawfully in violation of Section 18.2-96, Code of Virginia:

steal property, namely 2 two checks

valued at less than $200.00 and belonging to

Jennifer Collins

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of

T.E. Lawson, Officer C'burg PD

PJM 3/24/95, Complainant.

Execution by summons [X] permitted at officer's discretion. [ ] not permitted.

03/10/95 03:39PM
DATE AND TIME ISSUED

/s/ Robert N. Alderman
[ ] CLERK [ ] MAGISTRATE
[ ] JUDGE

Robert N. Alderman, Magistrate

SUMMONS (If authorized above and by serving officer)

You are hereby commanded to appear before this court located at

Main & Franklin Streets Christiansburg, VA 24073
on at ~~AM XPM~~

I promise to appear in accordance with this Summons and certify that my mailing address as shown at right is correct.

X /s/ Illegible
ACCUSED

WARNING TO ACCUSED: You may be tried and convicted in your absence if you fail to appear in response to this Summons. Willful failure to appear is a separate offense.

SIGNING THIS NOTICE DOES NOT CONSTITUTES AN ADMISSION OF GUILT.

FORM DC 314 7/94 PC (114:3 021 5/94)

ACCUSED

Barker, Gary W
LAST NAME, FIRST NAME, MIDDLE INITIAL)

330 Merrimac Rd
ADDRESS/LOCATION

Blacksburg, Va 24060

To be completed upon service as Summons

Mailing address [ ] Same as above [ ]

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO	DAY	YR	HT FT	IN	WGE	EYES	HAIR
W	M	05	12	76	5	06	125	BL	BR

SSN 223-13-3290

Commonwealth of Virginia

WARRANT OF ARREST

CLASS 1 MISDEMEANOR

[X] EXECUTED by arresting the Accused named above on this day:

[ ] EXECUTED by summoning the Accused named above on this day:

[ ] For legal entities other than individuals, service pursuant to § 19.2-76.

3/10/95 3:45 pm
DATE AND TIME

T.E. Lawson, ARRESTING OFFICER

023 Christiansburg P.D.
BADGE: NO. AGENCY AND JURISDICTION

for _____
SHERIFF

Attorney for the Accused:

Illegible

DATE AND TIME
03/15/95 8:3 illegible

4/25/95 illegible

[ ] Motion to Change Bond on:
[ ] changed to $
[ ] no change

_____
JUDGE

The Accused was this day:
[ ] tried in absence
[X] present

Attorneys Present:

Schwabs
[ ] PROSECUTING ATTORNEY (NAME)

Showalter
[ ] DEFENDANT'S ATTORNEY (NAME)

[ ] NO ATTORNEY
[ ] ATTORNEY WAIVED

The Accused PLEADED:
[X] not guilty
[ ] nolo contendere
[ ] guilty

And was TRIED and FOUND by me:
[ ] not guilty
[X] guilty as charged
[ ] guilty of .....
[ ] facts sufficient to find guilt but defer adjudication/disposition and place accused on first time offender probation, §§ 18.2-251 or 19.2-303.2

And was FOUND by me to be:
[ ] driving a commercial motor vehicle
[ ] carrying hazardous materials

[ ] I ORDER the charge dismissed
[ ] I ORDER a nolle prosequi on Commonwealth's motion

[ ] I ORDER the charge dismissed:
  [ ] conditioned upon payment of costs (accord and satisfaction) § 19.2-151
  [ ] conditioned upon payment of costs and successful completion of traffic school § 14.1-123

4/25/95
DATE

[ ] I impose the following Sentence:

[ ] FINE of $_____ with $_____ suspended;

[ ] JAIL sentence of 10 days imposed with _____ suspended conditioned upon being of good behavior and keeping the peace. Credit for time served.

[ ] Serve jail sentence on weekend beginning _____

[ ] Work release authorized if eligible

[ ] Work release required

[ ] on PROBATION for _____

[ ] DRIVER'S LICENSE suspended _____

[ ] Referred to VASAP

[ ] Referred to CDI

[ ] RESTITUTION of $ _____
due by _____
Payable to _____
as condition of suspended sentence.

[ ] _____ hours of community service to be performed for _____
  [ ] in addition to other sentence provisions
  [ ] to be credited against fines and cost at $_____/hr.

[ ] Contact prohibited between defendant and victim/victim's spouse and children pursuant to Va. Code § 18.2-60.3.

[ ] Bond: $_____

[ ] Other: _____

Bail on Appeal $_____

[ ] appeal noted on _____

[ ] Remanded for CCRE Report

Jail time concurrent with time by #950999

DTM

/s/ Illegible
JUDGE

FINE $

COSTS

112)) PROCESSING FEE	$ 22.-
140 113 WITNESS FEE	2.-
Billed 9/27/95	
120 CT. APPT. ATTY.	$ 73.75
125 WEIGHTING FEE	
132 CICF	20.-
133 BLOOD TEST FEE	
229 CHMF	2.-
OTHER (SPECIFY): _____	$
TOTAL	$119.75

109 INTEREST CHARGE
TOTAL WITH
INTEREST CHARGE $
DATE PAID RECEIPT NO

$ discharged by hours
of community service (documentation attached)

REQUEST FOR APPOINTMENT OF A LAWYER

File No. 951651

Montgomery County

CITY OR COUNTY

Commonwealth vs: Gary Barker – Adult

[ ] Circuit Court
[X] General District Court
[ ] Juvenile and Domestic Relations District Court

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER – STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

X /s/ Illegible
ADULT

DATE

The Court was advised that , a lawyer, has been retained to represent the accused in this Court. This information was provided by:

[ ] the above-named person

[ ] the lawyer [ ]

DATE JUDGE CLERK

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

---

[ ] the Adult is not indigent and not entitled to representation by a court-appointed attorney.

[ ] the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel:

[ ] the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel;

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

4-25-95 9:30 A.M.
NEXT HEARING DATE AND TIME

3-21-95
DATE

X Illegible
JUDGE

File No. 506

NAME, ADDRESS OF COURT APPOINTED LAWYER

Joey Illegible

635 9056 3592

FINANCIAL STATEMENT – 3593

Case No. _____

ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

Presumptive Eligibility:

[X] I currently receive the following type(s) of public assistance in Montgomery Co. (City/County)

[ ] AFDC $_____ [X] Food Stamps $_____

[ ] Medicaid

[ ] Supplemental Security Income $_____

Other (specify type and amount)

_____

[ ] I currently do not receive public assistance.

Names and addresses of employer(s) for defendant and spouse:

Self

_____

Spouse

_____

NET INCOME:

	Self	**Spouse**
Pay period (weekly, every second week, twice monthly, monthly)	____	____
Net take home pay (salary/wages, minus deductions required by law)	$___	___

Other income sources (please specify) – see reverse	$___	___	
TOTAL INCOME	$___	+ ___	=COURT USE ONLY A

ASSETS:

Cash on hand	$___	___	
Bank Accounts at:	$___	___	
Any other assets: (please specify)			
with a value of	$___	___	
Real estate–$_____ Net Value	$___	___	
Motor Vehicles			
with net value of Year and Make	$___	___	
with net value of Year and Make	$___	___	
Other Personal Property: (describe)			
_____	$___	___	
TOTAL ASSETS	$___	+ ___	=COURT USE ONLY B

Number in household 2
Number of dependents (spouse/children) whom you support: ___

EXCEPTIONAL EXPENSES

(Total Exceptional Expenses of Family)

Medical Expenses (list only unusual and continuing expenses)	$___	
Court-ordered support payments/alimony	$___	
Child-care payments (e.g. day care)	$___	
Other (describe): _____	$___	
TOTAL EXPENSES	$___	=COURT USE ONLY C
COLUMN "A" plus COLUMN "B" minus COLUMN "C" equals available funds		=COURT USE ONLY

THIS STATEMENT IS MADE UNDER OATH: ANY FALSE STATEMENT OF A MATERIAL FACT TO ANY QUESTION CONTAINED HEREIN SHALL CONSTITUTE PERJURY UNDER THE PROVISIONS OF § 19.2-161 OF THE CODE OF VIRGINIA. THE MAXIMUM PENALTY FOR PERJURY IS CONFINEMENT IN THE PENITENTIARY FOR A PERIOD OF TEN YEARS.

I hereby state that the above information is correct to the best of my knowledge.

Name of defendant
(type or print) /s/ Gary Wayne Barker

3/15/95 — Date
/s/ Gary Wayne Barker — Signature

Sworn/affirmed and signed before me this day.

3/15/95 — Date
Illegible — Signature

Judge — Title

3593

SUPREME COURT OF VIRGINIA

Supreme Court of Virginia
AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

OPENING BRIEF OF APPELLANT

Max Jenkins
JENKINS & JENKINS
Post Office Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
ATTORNEY AT LAW
805 Triangle Street
Post Office Box 11422
Blacksburg, VA 24062
(540) 552-4567

Counsel for Appellant

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STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Appellant received the death penalty in this Capital Murder case. He and two others, including his brother Mark Lilly, were charged with several crimes. The Appellant was charged with being the trigger man in the robbery and murder of Alexander DeFillipis.

Appellant's brother, Mark Lilly, who was brought in as a witness without being given immunity, refused to testify, asserting his 5th Amendment right. His statements to police would later be read to the jury. Moreover, Mark Lilly would later admit under oath that he had lied to police.

At trial, certain objections and exceptions were made by the defendant. The defendant alleged error from the selection of certain jurors; error in the display by the Commonwealth at counsel table a photograph of the victim in life; error by the Commonwealth's Attorney in his closing argument by pointing the murder weapon toward defense counsel and Appellant; the admission of two hearsay statements of Appellant's brother after the assertion of the brother's 5th Amendment rights.

The two statements made by Appellant's brother contained much more than a declaration against the interest of the brother. The statements introduced and approved by the Court contained statements by police officers that they in effect did not believe that Mark Lilly had killed DeFillipis, but that they believed in fact that Appellant was guilty of the murder. Obviously, this is an opinion as to the innocence or guilt of Appellant, Benjamin Lee Lilly, and is not admissible.

STATEMENT OF FACTS

At the start of this trial, the Commonwealth displayed in full view of the jury a framed portrait of the victim in life. After the Court ruled that the Commonwealth should not have placed the photograph, a motion for mistrial was denied.

The evidence most favorable to the Commonwealth indicates that the Appellant, his brother Mark Lilly, and Gary Barker burglarized a home in Floyd County, Virginia and thereafter travelled to Radford, Virginia to the home of a friend, where personal property taken from the burglary was divided. All three men were drinking heavily. The Court would refuse an instruction on voluntary intoxication.

After travelling to several places within Montgomery County, Virginia, the automobile in which the three were travelling became disabled near a convenience store, Hethwood Express, in Blacksburg, Virginia.

The murder victim, Alexander DeFillipis, had driven a friend to the convenience store. The evidence indicates that while DeFillipis' friend was inside the store, the Appellant carjacked the vehicle and, along with Mark Lilly and Barker, took Alexander DeFillipis with them to a secluded spot in Montgomery County, Virginia where the three forced DeFillipis to disrobe. Shortly thereafter, DeFillipis was shot three times in the head, killing him instantly.

The three travelled from the scene of the murder to Eggleston, Virginia and Pembroke, Virginia, where they robbed two stores. The three were apprehended after the

robberies; Barker and Mark Lilly unsuccessfully attempted to flee from police.

A portion of the Commonwealth's evidence consisted of blood found on the back of Appellant's pants leg, which could not be determined to be of human origin. Appellant objected to the admission of a statement allegedly made by Appellant to Chief Whitset.

Appellant objected also to evidence being introduced regarding his refusal to participate in a paraffin test after he had been advised erroneously by investigating officers that participation was voluntary.

Objection was also made to the admittance of the medical report as evidence on the grounds that it was hearsay and that the medical examiner appeared in court and had testified to the jury concerning item in the report.

Objection was also made to one of the Commonwealth's chief witnesses, co-defendant Gary Barker, having read prior newspaper articles that the Court ordered witnesses not to read. (Barker was not present when this admonishment was given.)

The main evidence linking the Appellant to the crimes was co-defendant Gary Barker and two taped statements of co-defendant Mark Lilly, Appellant's brother. The Court ruled that Mark Lilly's assertion of his 5th Amendment rights resulted in his being unavailable. Objection was made to the taped statements in which Mark Lilly told an investigator, "we had nothing to do with the shooting." He further stated that "we" meant Mark Lilly and Gary Barker. The statement of Mark Lilly

contained statements of the police (giving opinions of defendant's guilt), and statements that Mark Lilly and Barker thought the Appellant was going to let DeFillipis go. The statement of Mark Lilly named Appellant as the trigger man, placing Appellant as the person facing the death penalty.

The Court also refused to give an instruction on voluntary intoxication and an instruction stating that if the jury had a reasonable doubt as to punishment (life or death), they had to impose the lower grade of life imprisonment.

Gary Barker's testimony also implicated Appellant as the trigger man.

During closing arguments, the Commonwealth's Attorney pointed the murder weapon in the direction of defense counsel and Appellant. A mistrial was requested, but again refused.

IN THE SUPREME COURT OF VIRGINIA

BENJAMIN LEE LILLY,	)	
Appellant	)	
v	)	**Record No. 972386**
COMMONWEALTH OF VIRGINIA,	)	
Appellee	)	

AMENDED ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

Now comes the Appellant and pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia and assigns as error the following:

ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 118-153.

2. The trial court erred when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 330.

3. The trial court erred when it refused to seat Kristine Mitchell when she indicated that she could follow

the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Pages 390-418.

4. The trial court erred when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Page 501-526.

5. The trial court erred when it sat James Rakes as a juror when he indicated he would believe Chief Whitsett more than other witness because he knew Chief Whitsett, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 576-605.

6. The trial court erred when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 606-626.

7. The trial court erred when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution. Transcript Volume 2A, Pages 645-656.

8. The trial court erred when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could

follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript volume 2B, Pages 936-952.

9. The trial court erred when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution. Transcript Volume 2B, Page 957-964.

10. The trial court erred when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 212-215, Transcript Volume 2, Page 198, and Transcript Volume 2B, Pages 783-784 and 1011-1013.

11. The trial court erred when it refused to allow the defense to educate the jury during voir dire in regard to the option life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 138-140 and 273-274.

12. The trial court erred when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 207-209.

13. The trial court erred when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and

fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 220-222.

14. The trial court erred when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 220-232. Transcript Volume 5 pages 1394-1395.

15. The trial court erred when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 240-264 and Transcript Volume 1, Page 14-18, 249, 250, 251, 252.

16. The trial court erred by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 17-18.

17. The trial court erred in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23 and Transcript Volume 4, Pages 773-777, statement made

between pages 813-814, 847-848 and 866-867, Transcript Volume 5 pages 1303, 1587-1598, 1610-1620 and 1652-1653.

18. The trial court erred when it determined that a co-defendant's statement met the criteria set forth in *Chandler v Commonwealth*, 249 Va 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23; Transcript Volume 4, Pages 773-790, 847-848, and 866-867; Transcript Volume 5, Pages 1303, 1587-1598, 1610-1620, and 1652-1653.

19. The trial court erred when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 54-56 and 93-94.

20. The trial court erred in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 302.

21. The trial court erred when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 545-546, and 561.

22. The trial court erred in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 551-560, and 577.

23. The trial court erred when it refused to declare a mistrial after a co-defendant, (Barker) read an article on the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 29-40, 674-675.

24. The trial court erred when it allowed a police officer (Officer Whitsett) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 149-185, 268-273. Transcript Volume 4, Pages 758, 864. Transcript Volume 5, Pages 1541-1542.

25. The trial court erred when it allowed statements allegedly made by the Defendant to Chief Whitsett when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 154-185, 268-273.

26. The trial court erred when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct

that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 888-892, 904.

27. The trial court erred when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1193-1196.

28. The trial court erred when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1279-1292, 1310-1311, and 1317-1321.

29. The trial court erred at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1486.

30. The trial court erred when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1492-1493.

31. The trial court erred when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1498.

32. The trial court erred when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 282.

33. The trial court erred when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 266-268.

34. The trial court erred when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 789-793, and 811.

QUESTIONS PRESENTED AND ARGUMENT IN SUPPORT

1. Did the trial court err when it refused to seat Ms. Huffman as a potential Juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.510-545)

2. Did the trial court err when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.716-722)

3. Did the trial court err when it refused to seat Kristina Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A782-812)

7. Did the trial court err when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution? (A.1039-1050)

8. Did the trial court err when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1335-1351)

9. Did the trial court err when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution? (A.1356-1363)

During the voir dire process the trial court struck several jurors for cause when they indicated opposition to the death penalty. The trial court, especially in the cases of Ms. Huffman, Ms. Mitchell and Ms. Jones, abused its discretion and struck the jurors for cause.

Beginning with Connie Huffman, the trial court struck for cause because of a concern about the juror's ability to apply the death penalty. Ms. Huffman stated to the trial court that she could impose a death penalty and that she would follow the trial court's instruction and follow the law. During her entire questioning by the trial court and counsel regarding her ability to perform her duty, Ms. Huffman stated that while she didn't believe in the death penalty, if she had to be on the case "I would be fair in what my decision would be." (A.514) Moreover, when asked by the trial court if her belief or opinion would impair her from imposing the death penalty, Ms. Huffman stated that "I don't think that would be any problem." *Ibid.*

In regard to Janet Matheson, Appellant concedes that Ms. Matheson did express an inability to impose the death penalty due to her beliefs, however the Appellant maintains that he is entitled to a jury of his peers and that by striking Ms. Matheson the trial court denied the defendant that right.

The third juror struck was Kristina Mitchell. Ms. Mitchell stated to the trial court that she was struggling with her own beliefs regarding the death penalty, however she indicated that she could follow the law and impose the death penalty. (A.786) Over the entire questioning Ms. Mitchell agreed to follow the trial court's

instruction which included possible imposition of the death penalty. Specifically, when asked by the trial court whether her beliefs would impair her responsibility, Ms. Mitchell stated "No," that they would not effect her responsibility. (A.810)

Regarding Ms. Wallace the Appellant concedes that Ms. Wallace expressed a reluctance to set aside her beliefs, but she indicated that she would be able to follow the law.

Ms. Jones indicated that she had spoken to her minister and felt that she could serve as juror. (A.1340) She did indicate it would be difficult to sit in judgement of another person and sentence someone to death, but would the trial court desire someone who took that duty lightly? When viewing the entire voir dire it is clear that Ms. Jones understood her duty as a juror and was capable of carrying it out.

The Appellant concedes that Ms. Mumaw expressed an opinion that she could not impose the death penalty. However, the Appellant argues that he is entitled to a jury of his peers and that by excluding Ms. Mumaw the trial court denied the defendant that right as provided by the U.S. constitution.

In determining whether the trial court abused its discretion this Court has stated that several factors must be considered on appellate review. First, the juror's views would have to substantially impair or prevent their performance of their duties as a juror; second, the trial court's decision will not be disturbed unless there is manifest error because the trial court is in a position to view and hear the juror; and third, that this Court will

review the entire voir dire, not a single question. *Barnabei v Commonwealth*, 252 Va. 161, 173, 477 S.E.2d 270 (1996).

When applying the law to the matter at hand the Appellant maintains that trial court abused its discretion, especially when examining Ms. Huffman, Ms. Mitchell and Ms. Jones. The Appellant maintains such abuse in discretion rose to the point of being a manifest error. Ms. Huffman on several occasions maintained that she could be fair and set aside her own beliefs and apply the law. However, the trial court ignored Ms. Huffman's responses and focused in on her belief about the death penalty. The law requires that the belief must substantially affect the juror's ability to perform their duty, but Ms. Huffman maintained throughout her voir dire that she could fulfill that duty. Ms. Jones made the same commitment to serve responsibly as a juror.

4. Did the trial court err when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.916-920)

The Appellant maintains that when the trial court banned the defense from deviating from the approved list of questions, it deprived the Appellant from asking relevant questions of the potential jurors as allowed for by *Buchanan v Commonwealth*, 238 Va. 389, 384 S.E.2d 757, (1989). Thereby the trial court abused its discretion and violated Virginia code § 8.01-358.

5. Did the trial court err when it sat James Rakes as a juror when he indicated he would believe Chief Whitset more than other witness because be knew Chief Whitset, in violation of the Defendant's rights

as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.970-999)

6. Did the trial court err when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Ramlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1000-1020)

On two occasions the trial court failed to strike jurors for cause when it was clear that neither James Rakes nor Samuel Shumate were impartial as required by the United States Constitution, the fifth and eighth through the fourteenth Amendments.

On Page A.988 of the Joint Appendix Mr. Rakes gives a clear and honest answer that he would believe Chief Whitset more than other witnesses because of their relationship. In addition, when asked whether he would give Whitset more credibility than other witnesses Rakes states "(i)t's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do." (A.988) When the trial court questioned Rakes about his ability to view all witnesses with the same weight, Rakes responded "No, your Honor, I think what I meant to say was I'd probably start off at a different point because you do have some familiarity, some knowledge and some past about that person, may be you would start with a different feeling when you first began, but I don't know that would carry on through

all the testimony." (A.997) Clearly, by all of Rakes' statements he felt that he would give Whitset more credibility at the start of his testimony then other witnesses. Whitset was also an important witness in the case because of alleged statements that Lilly may have given to him. Whitset's creditability was brought directly into question as to what he believed he heard Lilly say. The trial court was aware of Whitset's importance, because the trial court had heard a motion to suppress the statement months before. Defense counsel was forced to use one its preemptory challenges to strike Rakes.

In Mr. Shumate's case, Shumate testified that he was related to Investigator Hamlin and that Shumate consider Hamlin to be a "real good friend." (A.1016) Moreover, the defense informed the trial court that they intended to call Hamlin and criticize some of his work on this case. Defense counsel did just as it had proffered and attacked the manner in which Hamlin had handled pieces of evidence. Hamlin was also one the investigators who questioned Mark Lilly.

In objecting to Rakes and Shumate, defense counsel cited *Breeden v Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976), which holds that a defendant has a constitutional right to a fair and impartial jury and that all that is needed to strike a juror is reasonable doubt. (See also *Wright v. Commonwealth*, 73 Va. (32 Gratt.) 941 (1879). In applying the law to the matter at hand it becomes clear that reasonable doubt was present regarding both Rakes' and Shumate's impartiality due to their relationships to prospective witnesses, thereby violating Appellant's constitutional rights to a fair and impartial jury.

10. Did the trial court err when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.305-308, 590-591, 1181-1182, 1410-1412)

The defense filed several affidavits to show that there was community prejudice towards the Lilly. Radio, television and newspaper articles recite inflammatory, hostile and prejudicial accounts of Lilly and the crime for which he was charged. These reports also included conclusory labels about Lilly which were prejudicial in nature, such as the *Roanoke Times* editorial calling Lilly a "thug" and asking why the [sic] he wasn't incarcerated. In addition the newspapers reported sympathetic information about the victim. In a Virginia capital case the trier of fact cannot receive a victim impact statement before the sentencing phase of the trial which describes the victim and the effect his death had on his survivors as well as the Community.

Moreover, the publication of Lilly's prior record was highly prejudicial. Numerous articles referred to Lilly's prior criminal record. Such publication created an opportunity for the jury's verdict to rest on impermissible grounds. The widespread publicity concerning the nature of the alleged offenses and Lilly's alleged involvement presented a reasonable likelihood that Lilly would be denied his constitutional right to a fair trial and impartial jury. Therefore a change of venue under Va. Code Ann. § 19.2-251 was necessary to protect Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

11. Did the trial court err when it refused to allow the defense to educate the jury during voir dire in regard to the option of life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.231-233, 366-367)

On two separate occasions, defense attempted to educate the jurors before the sentencing phase in regard to the fact that Parole has been abolished for those in Virginia who are convicted under the capital murder statute. Specifically, counsel proffered the following question to the trial court; "Would you be more likely to objectively consider life in prison if you knew that a sentence of life in prison means that the person would not ever become eligible for parole?"

Appellant maintains that by refusal to allow defense counsel to educate the jury during voir dire prohibited him from obtaining a fair and impartial jury. The United States Supreme Court held in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) that the defendant had a right to educate the jurors that life in prison meant life in prison. However, in order to properly voir dire the jurors, the Appellant needed the ability to inform the potential jurors that if convicted Lilly would not be released until his death. Appellant maintains that this was a violation of his rights as guaranteed by the fifth and sixth through the fourteenth Amendments of the United States Constitution.

12. Did the trial court err when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death

penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.300-302)

31. Did the trial court err when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2982-2983)

In order to ensure effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States, Appellant in this case attempted to determine the appropriateness of a motion to dismiss the capital indictment upon which this prosecution was based were unconstitutional as applied in this action.

Appellant argued that the statute may be unconstitutional as applied in this case because, inter alia, (1) the evidence for the Commonwealth may, as a matter of law, have been obtained unconstitutionally or be insufficient to establish the elements of capital murder, or (2) the Commonwealth may seek to apply one or more of the aggravation factors necessary to render defendant eligible for a sentence of death in an unconstitutional manner or the evidence may, as a matter of law, be insufficient to support a sentence of death.

Notice and opportunity to be heard are the cornerstones of due process of law. *Lankford v Idaho*, 500 U.S. 110, 127 (1991); *Goss v Lopez*, 419 U.S. 565, 579 (1975). Further, due process requires that a defendant be given

notice and opportunity to defend against the Commonwealth's case for death. *Simmons v South Carolina,* 114 S.Ct. 2187 (1994); *Lankford v Idaho,* 500 U.S. 110 (1991); *Gardner v Florida,* 430 U.S. 349 (1977). In addition, the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages. *Lockett v Ohio,* 438 U.S. 586, 604 (1976). The Virginia Supreme Court has held that the indictment gives notice of the offense. *Beard v Commonwealth,* 248 Va. 68, 445 S.E.2d 670 (1994); *Mickens v Commonwealth,* 247 Va. 395, 442 S.E.2d 678 (1994). The indictment, however, gives no notice of aggravating factors, including the constitutionally required narrowing construction if the government will rely on the "vileness" factor.

Appellant, in demanding that the Commonwealth identify its evidence, did not seek discovery. Copies of statements of the Commonwealth's witnesses and scientific evidence, for example, were not sought in the motion for the Bill of Particulars. Rather, Appellant sought and was entitled to have the Commonwealth identify its evidence so that proper pretrial challenges to the application of Virginia's capital murder statute in this case could have been made where appropriate. The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the law of Virginia both authorize that the bill of particulars be granted when challenging the constitutionality of a statute.

Va. Code Ann. § 19.2-266.2 requires the defense to raise a motion to dismiss an indictment or any count thereof, on the ground that a statute upon which it is based is unconstitutional, by written motion or objection prior to trial, which is what counsel did in this matter.

Additionally, defense motions for suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Constitution of the United States or the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination must be raised by written motion or objection prior to trial.

The statute further requires that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2230." The appellant requested a bill of particulars in order to move for dismissal of the capital indictment or to prohibit imposition of the death penalty an the grounds that Va. Code Ann. § 18.2-231 and Va. Code Ann. § 19.2-264 were unconstitutional as applied in this case. However the trial court denied Appellant's motion.

A motion to dismiss an indictment on the grounds that the underlying statute is unconstitutional on its face requires no such information; for example, a bill of particulars is not sought in aid of defendant's motion to prohibit imposition of the death penalty alleging systemic deficiencies in Virginia death penalty statutes. The indictment and the underlying statute are sufficient grounds to make this motion.

The Appellant argued in contrast, Va. Code Ann. § 19.2-266-2 requires the Commonwealth to provide such in order for the defense to make a timely motion to dismiss the capital indictment on the grounds that the underlying statutes are unconstitutional as applied to this

defendant, in that the time, place, manner, and means of the crime are constitutionally insufficient and cannot support either the capital indictment or the imposition of the death penalty.

The motion for a bill of particulars requests identification of all evidence upon which the Commonwealth intends to rely in seeking a capital murder conviction or imposition of the death penalty. Such identification is essential to enable the defendant to determine whether to move for suppression of the evidence on the grounds that it was obtained in contravention of the constitution.

The Supreme Court of Virginia has held that "[t]here is no general right to discovery in a criminal case, even where a capital offense is charged." *Strickler v Commonwealth*, 241 Va. 482, 490, 404 S.E.2d 227, 233 (1991). However, recognizing that the line between general discovery and a bill of particulars is difficult to draw, the General Assembly has determined that because notice of evidence to support a defendant's pre-trial motions under § 19.2-266.2 is compelled by the Sixth, Eighth and Fourteenth Amendments, the trial court is required by that statute to direct the Commonwealth to file a bill of particulars upon motion of the defendant.

It has been repeatedly held by the Virginia Supreme Court that it is the duty of the trial court to compel the attorney for the Commonwealth, when demanded by the accused, to file such bill of particulars as will apprise the defendant of the cause and nature of his accusation. *Riner v Commonwealth*, 145 Va. 901, 134 S.E. 542 (1926). In a capital case, the cause and nature of the allegation include those factors the Commonwealth must prove in

order to render a defendant eligible for a sentence of death. The United States Supreme Court also has noted that, in order for the requirements of due process to be met and for the adversarial system to work properly, counsel must be given "a meaningful opportunity to present a complete defense," *Crane v Kentucky*, 476 U.S. 683, 690 (1986), and that a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v Florida*, 430 U.S. 349, 362 (1977). This requires notice of all such facts that will influence the sentencing decision. *Simmons v South Carolina*, 114 S.Ct. 2187 (1994) (due process requires that a defendant be permitted to rebut the future dangerousness aggravating factor with evidence of parole ineligibility if sentenced to life in prison); *Lankford v Idaho*, 500 U.S. 110, 126 (1991) (lack of notice that the death sentence may be imposed by the trial judge, even though the prosecutor was not requesting the death penalty, created an "impermissible risk" that the adversarial system would not function properly).

In Virginia, the Commonwealth must prove one of two aggravating factors to support the death penalty. The jury may impose a death sentence only if it finds that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery (the "vileness" factor), or that the defendant would commit criminal acts of violence in the future that would constitute a continuing serious threat to society (the "future dangerousness" factor). Va. Code Ann. § 19.2-264.4 (1990).

The Virginia "vileness factor" requires narrowing constructions to further distinguish its application because it uses broad, vague term that could apply to any murder. *Maynard v Cartwright*, 486 U.S. 356 (1988). The narrowing construction becomes, in effect, a limitation and clarification of the offense charged. The Supreme Court has flatly held that the language used in Georgia's "vileness" factor was constitutionally deficient.

Similarly, Virginia's "future dangerousness" aggravating factor is comprised of broad, vague terms that could apply to any murder. *Maynard*, supra. No limitation nor clarification of the overly broad offense described is provided to sentencers. Therefore, a constitutionally sufficient narrowing construction of the "future dangerousness" aggravator is also required. *Ibid.*

Furthermore, not all narrowing constructions are sufficient to meet constitutional requirements. *Shell v Mississippi*, 498 U.S. 1 (1990).

The appellant maintains Va. Code Ann. §19.2-266.2 required the trial court to order the Commonwealth to file a bill of particulars for this defendant. Further, for a capital defendant to have constitutionally adequate notice and opportunity to defend himself, it was essential that the Commonwealth provide the Appellant with both the aggravating factors and the narrowing constructions thereof upon which the Commonwealth intends to seek the death penalty. Finally, Va. Code Ann. §19.2-230 permits the trial court judge to order the Commonwealth to file a bill of particulars at his discretion; by failing to order a bill of particulars the trial court abused its discretion.

13. Did the trial court err when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-315)

14. Did the trial court err when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-328, 2878-2879)

20. Did the trial court err in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1741)

22. Did the trial court err in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1990-1999, 2016)

32. Did the trial court err when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.375)

On several occasions the trial court admitted evidence that was more prejudicial than probative.

During pretrial motions, Appellant moved to exclude color photographs and videotape of the victim after the murder. While some of the photographs may have been necessary to prove elements of the crime, the prejudicial effect would have been diminished if the trial court had required the Commonwealth to introduce black and white photographs. Lilly argues that the trial court, in failing to require black and white photographs and videotape, abused its discretion.

In addition, the trial court abused its discretion when it allowed evidence that blood was found on the back of Lilly's pants when there could be no determination as to the type of blood (whether it was human or animal blood) or as to the age of the blood. Moreover, the three co-defendants had killed a goose earlier in the day, the carcass and blood of which were found in the trunk of Benjamin Lilly's car.

Finally, the trial court refused to allow the defendant to stipulate that he was a convicted felon, instead allowing the prosecution to admit a prior malicious wounding conviction.

Coe v Commonwealth, 231 Va. 83, 340 S.E. 820 (1986) held that when relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy must be weighed against tendency of proffered evidence to produce passion and prejudice out of proportion to its probative value.

In examining the issues at hand Lilly maintains that the inflammatory nature of the photographs and videotape, the testimony regarding the unidentifiable blood on

Lilly's pants, and the fact that the trial court would not allow Lilly to stipulate that he was a convicted felon outweighs their probative value. In particular, there was absolutely no reason, except for inflaming the jury, that the Commonwealth needed to introduce Lilly's felony conviction when he agreed to stipulate this element.

15. Did the trial court err when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.333-357, 1437-1441, 1688-1691)

The defendant was erroneously advised by the government that such a test was voluntary on his part. Based on this statement, he refused this test.

His refusal was used as evidence against him. It is completely unfair for the defendant to be advised erroneously and then the government to get the benefit of his refusal. This could create all types of abuse in the future an the part of police. Clearly the admission of this testimony was in error. It has been held that silence cannot be used against a defendant. *Escobedo v. Illinois*, 378 U.S. 478 (1964). Certainly an erroneous statement by the government causing the defendant to engage in a course of conduct should also not be used against the defendant.

16. Did the trial court err by allowing a juror who had read a newspaper article about Mr. Lilly's past to

remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1438-1441)

A juror who has knowledge of specific acts of misconduct not related to the crime should not be seated. As a matter of Constitutional guarantee, the accused is entitled to a fair trial. Cases in Virginia have held that if certain preconceived opinions of jurors (for example, stemming from newspaper articles) cannot be removed by the trial judge, those jurors should not be seated.

However, in this case a juror learned of other specific acts not related to the murder charge from a newspaper article (A.36), which told of Appellant being on parole.

It is submitted that this juror, having knowledge of Appellant's prior criminal record, should have been struck for cause.

17. Did the trial court err in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Appellant is mindful of *Chandler v. Commonwealth*, 249 Va. 270 (1995), which held that Chandler's girlfriend's statements against her penal interest were admissible. The girlfriend's statement described riding in an automobile with Chandler and others to obtain a gun, and Chandler's discussion about "going in, robbing the

store and leaving." The girlfriend's statement also contained other statements further inculpating Chandler. The Chandler case appears to be the first case in Virginia that allowed the confession or statement of a co-defendant that was not exculpatory to the accused. It is submitted that Chandler and subsequent cases created a "new" exception to the hearsay rule and violates the defendant's 6th Amendment rights to confront and cross-examine.

The rule in Chandler has been upheld in subsequent cases, the most recent of which was *Randolph v Commonwealth*, 24 Va. App. 345 (1997). This case involved the admission of a co-defendant's statement during a joint trial with the defendant. This case also held that the confrontation clause was not violated by the admission of such a statement. This statement was allowed although made after the conspiracy had ended.

(From a reading of *Chandler* or *Randolph*, there is nothing to indicate that any statement of a police officer was admissible, nor were the opinions of a police officer admissible. The entire statement admitted in *Chandler* at page 278 concerned the factual conduct of Chandler's girlfriend; about Chandler robbing the store and about her acting as the driver of an automobile in the commission of this crime.

This court held that the girlfriend's statement qualifies as admissible hearsay and quoted *Ellison v Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978), (citing *Hines v Commonwealth*, 136 Va. 728, 117 S.E. 843, (1923).

In Ellison, it was the defendant, Ellison, (not the Commonwealth), who sought to have a statement admitted given by Joseph Brown indicating that he was the

perpetrator of a crime. This statement was exculpatory and aided Ellison.

In *Hines,* (also quoted in the Chandler case) a rule (that at the time was beneficial to the defendant), was adopted that was "out of line with the current of authority" and held that the evidence of an extra judicial confession exculpatory of the accused and made by a dead or otherwise unavailable witness, is admissible as an exception to the hearsay rule. (Please note in *Hines* that this was again the defendant who sought introduction of a hearsay statement). The Court held that the evidence of an extra judicial confession exculpatory of the accused was admissible.

The same rule was later affirmed in *Newberry v Commonwealth,* 191 Va 445, 61 S.E.2d 318 (1950), (requiring the statement to be exculpatory to the defendant), but none of these cases has ever allowed, prior to the Chandler case, these statements to be used Upon the request of the Commonwealth. In these cases, the person who made the statement was not present in court. It is submitted that there has not been a well established hearsay rule in the State of Virginia that allowed these statements to be used by the Commonwealth. The Commonwealth had such statements exculpatory to the accused, admitted against the government, because the Commonwealth does not have the right to confrontation. The rule established in *Chandler* creates an exception to the hearsay rule, which it is submitted cannot be used against the defendant, because it bars his right to confront that witness.

It is further submitted that in none of these cases were the opinions of a police officer, expressing his belief

in the defendant's guilt, allowed to be entered as evidence.

As further proof that this rule was not intended to be used by the Commonwealth, it is submitted that *Chambers v Mississippi,* 410 U.S. 284, 93 S.Ct. 1039 (1973), makes this clear. This was a Mississippi rule barring, (in Mississippi one cannot not call a witness and then impeach him), the admissions of declarations against penal interest, which the defendant in *Chambers* sought to have introduced. (Chambers sought to introduce a confession and other admissions that McDonald had killed the person, for impeachment). The Court refused to admit, on behalf of the defendant, evidence of a third party confession and statements against third parties. The United States Supreme Court in *Chambers* stated that the Third Party Confession should come in for the benefit of the defendant and further stated, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." The Court found that such exclusion denied the defendant's due process of law and reversed, finding that the right to confront and cross examine a witness has long been recognized as essential to due process.

The admission of such a statement is historically discussed in *Ellison,* at 404. This rule, which apparently had been adopted solely for the defendant's benefit, was "out of line with the current of authority". At *Ellison,* they particularly stated that the admission of this rule, "of an extra judicial confession, exculpatory of the accused and made by a dead or otherwise unavailable witness is admissible as an exception to the hearsay rule".

There is nothing indicated in the Virginia cases, prior to *Chandler,* that the rule which has been narrowly interpreted by this Court, should ever allow the Commonwealth to introduce a statement of third party implicating the defendant as was done in this case and in *Chandler;* and there is equally no language in the prior opinions allowing the statements in such a written confession containing statements of police officers that they believed the third party was telling the truth about the defendant killing a victim.

The rule of the admission of a declaration against interest or a confession prior to 1995 as an exception to the hearsay rule was only admissible in approximately five states, Virginia being one of them.

The statements in *Chandler* and the subsequent cases violate the constitutional rights of the defendant and certainly the statements of the police officers were hearsay.

18. Did the trial court err when it determined that a co-defendant's statement met the criteria set forth in *Chandler v Commonwealth,* 249 Va. 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Commonwealth over the Defendant's objections, introduced an out-of-court statement made by a co-defendant that specifically addressed the issue of guilt of the Defendant. The trial court held, after determining that Mark Lilly was unavailable, that his statement was

admissible under *Chandler v Commonwealth,* 249 Va. 270, 455 S.E. 2d 219 (1995). *Chandler* relied on *Ellison v Commonwealth,* 219 Va. 404, 247 S.E.2d 685 (1978) which holds that the confrontation clause will be satisfied if the following requirements are met:

1. Witness unavailable
2. The statements are against the declarant's penal interest making the statement inherently reliable

When examining Mark Lilly's statements to Investigators Price, Fleet and Hamlin it becomes clear that Mark Lilly was lying to them and attempting to give statements which would serve Mark's own desire to exculpate himself. Especially when it is taken into account that Mark Lilly was told the penalties he was facing and being encouraged by Fleet and Hamlin, on page A.2323 of Mark Lilly's statement to them, not to "take the rap" and that he was not the one who pulled the trigger.

In the first interview conducted by Price, (A.2257) Mark Lilly describes Gary Barker as his "brother's buddy" when in fact Barker and Mark Lilly were living together in a single bedroom mobile home, which they had rented from Alfred Falls. (A.2430, 2433) In addition Mark Lilly contradicts that assertion when he tells Fleet and Hamlin during the second interview, on page 2 of his statement to them (A.2319), that Ben came over to their trailer when Barker and Mark Lilly were still in bed.

Mark Lilly goes on to tell Hamlin that they had been drinking liquor and were drunk before the break-in at Danny Sanders' home, but according to the co-defendants' own statements they didn't have liquor until they

stole it from Sanders' home. The excuse of drunkenness is used throughout the interviews by Mark Lilly to distance himself from criminal activity and lay the blame at the feet of his brother and not the man he is living with. When Mark Lilly is asked where all the liquor came from, he implicates Ben as the sole one who stole it out of Danny Sanders' home. Specifically Price asks, "and when you say 'they got it out of a house', who are you talking about 'they'?" Mark replies "Ben". (A.2258) Price then asks "talking about Ben and who else?" and Mark Lilly then replies "Lilly, just Ben." *Ibid.* Price asks again "Just Ben, or Gary was with them?" Finally Mark Lilly admits "we was all on it." This admission makes it clear that Mark Lilly is trying to shift the blame away from himself and Gary Barker. Further, a reasonable inference can be drawn that Mark Lilly realized that Barker had admitted to Price that "they" had gone into Sanders I home when Price asked Mark Lilly again whether it was "just Ben or was Gary with them." In addition, when Price asks where the Sanders home was, Mark Lilly replies "somewhere in Floyd is all I can tell ya." (A.2258) When Mark Lilly is asked by Hamlin (A.2320) about the whose house was broken into, Mark Lilly denies knowing whose house it was and at first can only "guess" that he went in. According to Sanders, Mark Lilly had been to Sanders' home on several occasions, knew where Sanders' guns were kept and knew that Sanders worked out of town. (A.1626, 1627, 1630) On A.2259, Mark Lilly again gives another self-serving statement when asked by Price what other things were taken out of the Sanders home. Mark Lilly

replies "I don't, I don't really know, you know, everything that was got out cause I was drunk." When questioned further by Price, Mark Lilly gives a detailed account of what was taken. (A.2259-2260) When asked whose residence it was Mark Lilly gave no verbal statement, but according to Price, Mark Lilly indicated that he did not know whose home it was or its location. (A.2289) However, it is clear from Sanders that Mark Lilly had been in Sanders' home on several occasions.

As the questioning turns toward the abduction, robbery and murder Mark Lilly again distances himself from these events. When asked by Price if they all got in Alexander DeFillippis' vehicle, Mark Lilly gives yet another self-serving statement on page A.2263, that he "had to or get left man, I was so drunk." Mark Lilly tells Hamlin on page A.2322 that he didn't get out of the car when DeFillippis was robbed, but when he testified at the sentencing hearing in February of 1997, Mark Lilly admitted that he was the one who robbed DeFillippis. (A.3095, 3099)

When giving statements to Price, on page A.2271, about the time when the murder takes place Mark Lilly states that he nor Barker ever got out of the car. Again a self-serving statement that not only attempts to protect Mark Lilly, but Barker as well. However, it was clear from both the physical evidence and statements by Barker that both Mark Lilly and Barker got out of the car at the scene of the murder. The money clip found on the scene was identified as being the same one taken from Sanders' home and the one that Mark Lilly claimed at residence of Warren Nolan and Patricia Quesenberry. (A.1591-92, 1605) Moreover, Barker stated that Mark Lilly got out of

the car and they laughed at DeFillippis when the victim was stripped.

When asked about the distance that DeFillippis was shot by Ben Lilly, Mark Lilly stated that the distance was ten to fifteen yards on page fifteen of Mark Lilly's statement, while Barker describes the shots as coming from point blank range. Mark Lilly does not mention that he and Barker laughed at the victim when he was stripped down to his underwear, rather Mark Lilly states to Price "I don't know." (A.2268)

When Mark Lilly is asked questions about the robberies that took place immediately after the murder, he cannot remember that Barker had the murder weapon and used it to commit the robbery. When asked about taking a twelve-pack of beer from the first store, Mark Lilly states to Price " . . . I was so drunk, I don't do that shit, you know, if I'm sober." "I had money in my packet." (A.22-73) When asked if he got money from the first robbery Mark Lilly initially states "They got some." Only after subsequent questioning does Mark Lilly admit to Price, *ibid*, that he received a share of the money.

In regard to the second robbery in Giles, Mark Lilly states that "they got their stuff", not that he took his share as Barker suggested. (A.2278)

On page A.2279 in his statement to Price, Mark Lilly denies taking the murder weapon when he fled from the car when police arrived, even though the gun was found in the direction be fled.

However, the most illuminating fact is Mark Lilly's testimony, given under oath, where he admits lying to

Price, Fleet and Hamlin because he was scared when Price started talking about all those life sentences and decided to "(t)hrow it off an somebody else." (A.3096) When asked why he did not testify at Ben's trial Mark Lilly responded "I hadn't been to court yet" and that his " . . . lawyers told me that it was in my best interest to keep my mouth shut, so that's what I did. I took the fifth." (A.3096, 3100)

The appellant argues that Mark Lilly was, at every I opportunity, trying to distance himself from his brother and place himself in the best possible light in order to avoid the life sentences and possible death penalty that Price had mentioned.

When applying the 6th through the 14th Amendments of the United States Constitution to the matter at hand we know that Mark Lilly's statements, besides being contradictory in them elves, more importantly are inconsistent with the facts, the physical evidence, and the other witnesses' statements. One of the confrontation clause's purposes is to allow the defendant to confront his accusers, and to place these accusers under oath. When placed under oath Mark Lilly admitted he lied to the Investigators and refused to testify at the trial in order to protect himself.

Finally, even the trial court had some trouble in determining whether the statements made by Mark Lilly were against his penal interest when it stated that " . . . the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy." (A.2227)

19. Did the trial court err when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1477-1479, 1516-1517)

Not only are prosecuting attorneys under a duty to Prosecute, but they are under a duty to see that the accused gets a fair and impartial trial. *McClane v Commonwealth*, 202 Va. 197, 116 S.E.2d 274 (1960). *Jones v Commonwealth*, 196 Va. 10, 82 S.E.2d 482 (1954), further held that the Commonwealth Attorney should refrain from observations or remarks that evidence feelings of prejudice.

Certainly this rule was not followed in the matter at hand, when a photograph of the victim in life was displayed in front of the jury.

21. Did the trial court err when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1984-1995, 2000)

Some of the tests and reports in this matter were not conducted by Dr. Oxley, and are hearsay. However, the trial court ruled that they were admissible under the business records exception to the hearsay rule. Lilly maintains that this was error an the part of the trial court.

23. Did the trial court err when it refused to declare a mistrial after a co-defendant, (Barker) read an article in the newspaper concerning the trial despite the fact that Barker was sequestered, violating the

Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1452-1463, 2113-2114)

Early in the trial there was a motion to sequester the witnesses, which the trial court granted. However, in spite of this sequestration order, Barker elected to read newspaper accounts of the ongoing trial in violation of the trial court's order. Appellant maintains that if a sequestration order is to have any validity it must bind the witness to refrain from discussing the case and abstain from reviewing media descriptions of the proceedings. Moreover, sequestering the witness plays an important role in assuring a fair trial to both sides.

24. Did the trial court err when it allowed a police officer (Officer Whitset) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.242-278, 361-366, 2197, 2348, 3025-3026)

Officer Whitset asked the defendant, "what does a murderer look like?" The defendant's alleged response was, "me". Clearly, this was an incriminating statement and should have been suppressed. The defendant also stated he was going to hell to meet his brother, which was also in response to a question by the officer.

25. Did the trial court err when it allowed statements allegedly made by the Defendant to Chief Whitset when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments

in the United States Constitution? (A.247-278, 361-366)

On the night in question Appellant was placed in a patrol car after being taken into custody by officer Randy Tilley. Shortly thereafter Chief Whitset arrived an the scene and positioned himself outside of the vehicle in which Benjamin Lilly had been placed. Whitset admitted that he questioned Lilly about the identity of the others in the car, and whether those who had fled were armed. (A.258-261) Subsequently to this questioning Whitset states that Lilly asked Whitset to "do him a favor." (A.261-262) This "favor" was to put Whitset's shotgun in his mouth and pull the trigger. Whitset refused and stepped back away from the car. (A.274) Then Whitset asked Lilly "what does a murderer look like?" In response Whitset stated that he thought he heard Lilly say "me." (A.268) Whitset admitted that at the preliminary hearing he had "solicited" the question but "wouldn't construe it as being incriminating." (A.268-269) Moreover, Whitset knew at the time of the questioning that multiple armed robberies had taken place when he solicited the question from Lilly. (A.271) Whitset also stated that he had trouble hearing Lilly when he stepped away from the vehicle. (A.260)

The appellant maintains that *Miranda* applies to the matter of whether the statement was admissible against Lilly. There is no doubt that Lilly was in custody during the time that the above stated conversation took place meeting the first requirement of *Miranda*. The next issue is whether the statement was voluntary as the trial court held or whether the response "me" was solicited by the officer as Whitset stated. Whitset admitted on the day of

the motion hearing, as he did at the preliminary hearing, that the response was "solicited" by him. Moreover, when asked on cross-examination Whitset admitted that he had backed away from the vehicle in which Lilly was sitting. (A.274) This statement was not initiated by Lilly, rather it was solicited by Whitset and violates Lilly's rights as guaranteed by the U.S. Constitution specifically his fifth and sixth amendment rights through the fourteenth amendment.

In addition, on December 7, Whitset stated that he thought he heard Lilly say "me". However, when called to testify at the preliminary hearing and at the motion hearing Whitset stated that he was shocked by Lilly's response and the reason he said "thought" was because he only wanted to verify what Lilly had said. However, Whitset admitted that he had trouble hearing Lilly when he was backed away from the car, as he was when this statement was allegedly given. Furthermore, Whitset admitted that his memory was better on December 7 than at the preliminary hearing or at the motions hearing.

The appellant maintains that the trial court erred when it allowed this statement in because it was speculation on Whitset's part, and that its admission was a violation of Lilly's *Miranda* rights. Evidence placed before a jury is not intended to be mere guesswork; rather, Whitset thought he heard Lilly or he didn't. However, when you examine the fact that Whitset asked Lilly what he had said and moved closer to the car a reasonable conclusion can be drawn that Whitset was not certain what Lilly had said.

26. Did the trial court err when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.2372-2376, 2388)

Approximately five hours prior to the murder, co-defendant Barker made statements about shooting his best friend (A.2400, 2404, 2504-2516) to Joyce Lang. Such statements alarmed her to the extent that she refused to allow her son to go with Barker.

This evidence was favorable to the defendant and Section 8 of the Virginia Constitution, as well as the United States Constitution, allow the defendant to call for evidence in his favor.

Barker had the murder weapon and admitted he possessed the same shortly after the murder. These statements would further advance the Appellant's theory that Barker was the trigger man.

27. Did the trial court err when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution? (A.2677-2680)

There was more than a small amount of evidence, or "a scintilla" to support this instruction. There was evidence of large amounts of alcohol being consumed, as well as the statement of the Appellant.

28. Did the trial court err when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2763-2776, 2794-2795, 2801-2805)

During the Commonwealth's closing argument the Commonwealth's Attorney pointed the murder weapon at the defense counsel and/or the defendant; defense counsel objected to said action and requested a mistrial. (A.2763, 2772) The trial court in ruling on the Defendant's motion called the motion "ridiculous" before the jury. (A.2764) This Court held in *Compton v Commonwealth*, 190 Va. 48 (1949) that the "[r]ulings made in words or manner indicating antagonism or resentment toward counsel may convey the impression that the feeling includes also counsel's client." First and foremost, the Appellant argues that objecting to some one pointing a gun in counsel's direction is a natural action and should not be referred as ridiculous. However, the actual harm came from the statement by the trial court. By angrily calling the defense motion ridiculous the trial court gave the jury the impression that it was appropriate to point the gun at the defense, effectively undermining defense counsel's creditability with the jury. Appellant argues that this antagonism was uncalled for, inappropriate and constitutes reversible error. The aforesaid statement of the trial court clearly indicated antagonism or resentment by the trial court which was prejudicial to the defendant. Moreover,

defense counsel requested a corrective instruction in an attempt to lessen the effect of the trial court's statement, but again the trial court refused to grant any corrective instructions to the jury. (A.2774-2777)

29. Did the trial court err at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2970)

Although there is little authority on the proffered jury instruction, there is abundant authority in Virginia on closely related matters. A similar instruction has been given involving the grades of the offense. *Sanderson v Commonwealth*, 200 Va. 51, 103 S.E.2d 800 (1958).

30. Did the trial court err when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2976-2977)

It is submitted that it was error to refuse this instruction. *Lockhart v. McCree*, 476 U.S. 162 (1986). it is true that the Stockton Case states that this instruction should not have been given, but it is submitted that the Constitution calls for its inclusion.

33. Did the trial court err when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution? (A.359-361)

Appellant concedes that Virginia case law has held that Virginia's death penalty meets all constitutional requirements. However, Appellant argues that the death penalty constitutes cruel and unusual punishment. The Virginia statute is vague in both the "vileness" and "future dangerousness" issues and Appellate [sic] asks this Court to consider additionally the brief filed in the trial court Record and incorporates the same by reference.

34. Did the trial court err when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2228-2232, 2250)

Without question the government violated the trial court's discovery order. The defense was not allowed to bear Mark Lilly's devastating taped statements until after the trial began. (A.2228-2232) Although the Commonwealth had provided a written copy of the transcript, it did not provide a copy of the audio tape. However, the trial court's discovery order specifically stated:

> All alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist (in substance or verbatim), including, but not limited to audio tapes, video tapes, film, shorthand notes, print, typing or handwriting. (A.48)

The government violated this discovery order in violation of the defendant's rights.

CONCLUSION

It is submitted that any one, or a combination of the errors assigned, would entitle the Appellant to a retrial in this matter. In addition, Appellant requests to be allowed to present oral arguments in support of this Appellant Brief.

BENJAMIN LILLY

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We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Appellant Brief have been mailed to the Clerk of the Supreme Court of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia

23219, (804) 786-9527; on this 7th day of January, 1998. In addition, Appellant requests to be owed to present oral arguments in support of this Appellant Brief.

/s/ Christopher A. Tuck
Christopher A. Tuck

IN THE
SUPREME COURT OF VIRGINIA

Record Nos. 972385 and 972386

BENJAMIN LEE LILLY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

Benjamin Lee Lilly was tried by a jury in the Circuit Court of Montgomery County and found guilty on October 25, 1996, of the capital murder of Alexander DeFilippis as well as of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of the illegal use of a firearm.

In a separate sentencing proceeding on October 28, 1996, the jury sentenced Lilly to death for the capital murder on the basis of both "future dangerousness" and "vileness," and to the following sentences for the non-capital offenses: life imprisonment for robbery; life imprisonment for carjacking; ten years for abduction; five years for possession of a firearm by a felon; and 4 terms of three years each for the four convictions of the illegal use of a firearm. After considering a probation report and other evidence presented during the postsentencing hearing held on February 11, 1997, the trial court imposed the sentences which had been fixed by the jury: one death penalty, two life sentences plus 27 years in prison.

Fina! judgment was entered on March 7, 1997. (JA 93). On November 14, 1997, this Court certified the record in the non-capital cases and consolidated it for review with the record of the capital murder case.

QUESTIONS PRESENTED

1. Did the trial court err in refusing to seat potential jurors Huffman, Matheson, Mitchell, Wallace, Jones and Mumaw? (Assign. Error 1, 2, 3, 7, 8, 9).

2. Did the court err in disallowing voir dire questions not on the approved list? (Assign. Error 4).

3. Did the trial court err in qualifying potential jurors Rakes and Shumate? (Assign. Error 5, 6).

4. Did the trial court err in retaining a juror who had read a newspaper article about Lilly? (Assign. Error 16).

5. Did the trial court err in denying the motion for change of venue? (Assign. Error 10).

6. Did the trial court err in disallowing voir dire questions on parole ineligibility? (Assign. Error 11).

7. Did the trial court err in denying the motion for bill of particulars before trial and during the penalty stage? (Assign. Error 12, 31).

8. Did the trial court err in admitting photographs of the victim and a videotape of the crime scene and refusing to use black and white photographs? (Assign. Error 13, 14, 20).

9. Did the trial court err in allowing evidence that there was blood on Lilly's clothing? (Assign. Error 22).

10. Did the trial court err in allowing evidence of Lilly's prior conviction even though Lilly agreed to stipulate to the conviction? (Assign. Error 32).

11. Did the trial court err in allowing evidence of Lilly's refusal to take a paraffin test? (Assign. Error 15).

12. Did the trial court err in allowing Mark Lilly's pretrial statement into evidence? (Assign. Error 17, 18).

13. Did the trial court err in denying the motion for a mistrial based upon the prosecutor's display of a photograph of the victim? (Assign. Error 19).

14. Did the trial court err in allowing the medical examiner's written report into evidence? (Assign. Error 21).

15. Did the trial court err in denying the motion for a mistrial based upon a sequestered witness' reading of a newspaper article about the trial? (Assign. Error 23).

16. Did the trial court err in allowing Officer Whitsett to testify as to Lilly's pretrial statements? (Assign. Error 24, 25).

17. Did the trial court err in sustaining the prosecutor's objection to the introduction of statements made by Gary Barker to Joyce Lang? (Assign. Error 26).

18. Did the trial court err in refusing Lilly's proposed instructions on intoxication, gradation of punishment and residual doubt? (Assign. Error 27, 29, 30).

19. Did the trial court err in denying the motion for a mistrial based upon the prosecutor's pointing the gun at defense counsel during closing argument? (Assign. Error 28).

20. Did the trial court err in refusing to find Virginia's death penalty statutes unconstitutional? (Assign. Error 33).

21. Did the trial court err in allowing taped statements of Mark Lilly when the prosecutor provided only a written transcript of the statements before trial? (Assign. Error 34).

STATEMENT OF FACTS

Sometime on December 4, 1995, twenty-seven-year-old Benjamin Lilly got together with his twenty-year-old brother, Mark Lilly, and Mark's nineteen-year-old roommate, Gary Barker, at the defendant's home in Riner, Virginia, to drink and "smoke a little . . . pot." (JA 2030-2031). Later that night, the three men decided to go to Floyd County to Danny Saunders' home. (JA 2031). The defendant drove them in his Mercury Cougar. (JA 2030). Mark and Gary knew Saunders, had been to his home before and knew that he kept liquor and guns there. (JA 2032).

When they arrived at Saunders' home and found that Saunders was not there, they "decided just to go on in and help ourselves." They "[b]usted out the front glass in the door," went inside and took 9 bottles of liquor and 3 guns. (JA 2033). The guns were a .35-caliber rifle, a 16-

gauge shotgun and a .38 caliber pistol. (JA 2032). Each gun was loaded. They also took a safe. (JA 2034).

They loaded everything into the defendant's car, went to the defendant's sister's home and "busted" open the safe. Inside they found old coins, a money clip, stamps and knives. They split up the loot, began drinking the liquor and then decided to drive to Warren Nolen's home in Radford to see if they could "trade the guns for some dope." Nolen was the defendant's friend. (JA 2035-2037).

Around 7:30 p.m., they arrived at Nolen's home in Radford and displayed their loot to Nolen and his girlfriend, Patricia Quesenberry. (JA 1599-1601, 1586-1588). Patricia knew that Nolen could get into trouble if he was around guns because he was a convicted felon (JA 1589, 1601), so she and Nolen told the defendant and his companions to leave. (JA 1590). The three left after determining that they would be unable to sell or trade the loot because Nolen did not have "enough dope." (JA 2037).

The three men then drove to the trailer in Blacksburg where Mark and Gary rented rooms from "A.J." Fall, and spent the remainder of the night there. (JA 2038). The defendant, Mark and Gary left A.J.'s together on December 5, 1995, at about noon. (JA 2440). They drove the backroads around Shawsville and Elliston, drinking the stolen liquor. They stopped at a small country store, pumped gas for the car and left without paying. (JA 2040). They stopped in a wooded area of Shawsville where Gary fired the rifle and both Mark and the defendant took turns firing the pistol. (JA 2041). They then drove to Alleghany, stopped at a church and Gary and

Mark shot at some geese with the rifle and shotgun. They killed one goose and placed it in the trunk of the car. (JA 2043).

They then drove back to Blacksburg to the trailer park where they tried, unsuccessfully, to sell or trade the guns for "dope." (JA 2044-2046). At about 6:00 p.m., the three drove to a bar in Blacksburg called "Cowboys." They entered the bar where Mark recognized Ron Lucas from his construction job. (JA 1613). Mark asked Ron to go outside, showed Ron the pistol and offered it for sale. Ron asked if it was "hot," meaning stolen, Mark told him it was, and Ron handed it back to Mark. (JA 1614-1615). The defendant and Gary then came outside, Ron went back in the bar and the defendant, Mark and Gary drove away. (JA 1615, 1619).

They drove along Prices Fork Road heading into Blacksburg with the intention of returning to the trailer park to find some "dope." (JA 2049). As they were driving, however, the car's engine quit at the top of a hill and they were forced to coast the car back down the hill to a position on the wrong side of the road and across from a convenience store. (JA 2050-2051). They got out of the car, removed the license plates, liquor and guns, with the intention of "stashing" them in the woods until they could "steal" a car to "get out of there." (JA 2051). Gary had the rifle, Mark had the shotgun and the defendant had the pistol. (JA 2052).

In another part of Blacksburg – College Park – two Virginia Tech students were preparing for their upcoming final exams. Tom Staeger and Alexander DeFilippis had been roommates and friends for four years. Alexander

was twenty-two years old and was majoring in environmental science. (JA 1503-1504). He planned to spend the holidays with his family in this country and in Italy. (JA 1504).

That evening – December 5, 1995 – Tom and Alex left their apartment in College Park in Alex's car at about 7:00 and drove to a friend's to borrow some class notes. (JA 1503-1504). Alex drove his Plymouth K-car. (JA 1508-1509). Alex wore glasses and a watch and carried a wallet with a few dollars in it. (JA 1503-1504). They had planned to copy the notes at a convenience store's copier machine and then go to the school's library to study. (JA 1503). Alex drove them to a convenience store called the "Hethwood Express." (JA 1505).

On their way to the store, Alex hit a curb with his right front tire. (JA 1509). When they arrived at the store, Alex got out to look at his tire while Tom went inside to copy the notes. (JA 1510). That was the last time Tom saw Alex because, when he came out of the store, neither Alex nor his car were there. Tom called their apartment to see if Alex had returned, found out that he had not, and then noticed what looked like an abandoned car across the street. (JA 1506). Tom called "911" and the Blacksburg Police Department responded at about 7:20 p.m. (JA 1507).

When the defendant and his companions abandoned their car across from the convenience store, the defendant told the others to walk into the woods and "he would get us a car." (JA 2052). The defendant walked over to Alex, pointed the pistol at him and told him to give him his money. (JA 2054). Alex handed over his wallet (JA 2055).

The defendant called to Mark and Gary and they all got in Alex's car. (JA 2055-2056). The defendant got in the driver's seat, Gary got in the passenger's seat and Mark got in the back seat. The defendant ordered Alex to sit in the back with Mark. (JA 2054).

The defendant drove off towards Whitethorne, and during the ride Alex told his abductors that he would have given them a ride if they had asked, implored them to take him back to the store to pick up his friend and promised he would take them wherever they needed to go. (JA 2056). The defendant drove across a bridge and onto a deserted stretch of property owned by the Norfolk and Southern Railway Company. (JA 1721, 1764). The defendant stopped the car and Mark and Gary told Alex to close his eyes when they opened the car door to get out so that Alex could not see their faces. Mark had the pistol in his waistband at that time. (JA 2057).

After they all got out of the car, Mark told Alex to start walking and then the defendant ordered Alex to take his clothes off. (JA 2061). The night was cold and windy and it started snowing later. (JA 1734). Alex stripped down to his underwear briefs and socks. (JA 2061). Gary and Mark thought they were going to leave Alex there, forcing him to walk to a phone. (JA 2062-2063). Gary got back into the car in the driver's seat and Mark got in on the passenger's side. (JA 2063). The defendant got into the back seat and demanded that Mark give him the pistol. (JA 2064).

The defendant ran after Alex, who had walked about fifty yards, turned him around and shot him four times with the pistol. (JA 2063-2064). Three of the shots were to

Alex's head: one bullet went straight through the right side of his upper lip; one bullet went into his neck under his left earlobe and out through the back of his neck; one bullet went into his head above the right ear, through his brain and lodged in the left temporal bone. A fourth bullet went straight through his right forearm. (JA 1973-1974). All four shots were fired from a distance of more than two feet. (JA 1974). Alex died shortly after he was shot in his brain. (JA 1976).

With the first shots, Alex threw his arm up in defense and tried to stagger away. (JA 2064). When the fatal shot was fired, Alex fell backwards onto some discarded steel containers. (JA 1722). Alex's eyeglasses were found later at a distance of close to fifty feet away from where he finally fell. (JA 1825). A zigzagging blood trail showed where Alex had staggered before he fell. (JA 1735).

After the shooting, the defendant got into the car and told Gary and Mark that "that boy saw his face" and "I've been in the penitentiary and I ain't going back." (JA 2065). With Gary driving, the three left the area and drove to a store where the defendant bought beer with the money they had taken from Alex. (JA 2066). They then drove to the river and threw away items they believed contained their fingerprints: Alex's clothing and backpack and the plastic cover over the car's speedometer. (JA 2067).

They discussed where to go to hide out and the defendant suggested that they stay with friends of his in West Virginia. (JA 2070-2071). To obtain money for the getaway, they drove to the H&L Market in Eggleston in Giles County to rob it. When they arrived, they argued

over who would carry the gun inside. (JA 2069). The defendant said that he had done "what he had to do already," so Gary carried the pistol inside. (JA 2071). The defendant went in with an eight-inch knife. (JA 2553). They entered the store, held the owners at gun and knife point and robbed them of $425.00 in cash, of food stamps, a radio, beer, tobacco, gloves and sunglasses. (JA 2479-2490, 2547-2556). After the robbery, they drove to a railroad trestle where they counted the money, divided it up and decided it was not enough. (JA 2075).

With Gary driving, they then went to the M&W Market in Pembroke. Gary and Mark went into the store and Gary held the pistol up to the clerk and demanded her money. (JA 2575). The defendant remained in the car. (JA 2076, 2573). The owner, Bill Williams, came into the store and knocked the gun out of Gary's hand, but Gary retrieved it and continued to demand money. (JA 2576-2577). The clerk handed over a money bag filled with change and the robbers left the store. Williams told the clerk to call the police, ran to his car and pursued the three robbers long enough to get their license plate number. (JA 2580). The defendant was driving the car, Mark was in the passenger seat and Gary was in the back seat. (JA 2079). When they saw Williams in pursuit, Gary pointed the rifle out of the window and fired it. (JA 2079-2080). The shot did not result in injury to any person or property. (JA 2586).

Officer Price of the Giles County Sheriffs Department and Officer Tilley of the Pearisburg Police Department each had responded to the scene of the Eggleston robbery and were on their way to the reported second robbery in Pembroke when they came upon the robbers' car headed

towards them. (JA 1648, 1703). The car had stopped due to engine trouble and the defendant, Mark and Gary were attempting to remove the guns, radio, beer and other evidence from the car. (JA 2080-2081). Gary ran a few yards down an embankment and hid with the rifle. (JA 2081). Mark ran away through the woods.

The defendant was apprehended as he got out of the car, armed with the shotgun. (JA 1704-1705). Tilley and Price disarmed the defendant and a search disclosed the knife in his pants pocket. (JA 1649-1650). Upon questioning, the defendant falsely told them that there were three others with assault weapons, that one of them was named Mike Rader and that he (the defendant) was an undercover officer with the Montgomery County Sheriff's Office who had been picked up by the others while he was hitchhiking. (JA 1650-1651).

Several officers arrived at the scene and began to search for the other suspects. The officers heard Gary crying down in a ditch about fifty feet from the car. (JA 1875). Gary was sitting down with the barrel of the rifle up against his head. (JA 1858). The officers talked Gary into surrendering.

The defendant asked the officers if he could use their loudspeaker to talk to his brother and he was allowed to do so. (JA 2186). The defendant called Mark by name, asked him to "come out" and said, "You're not the one that's really in trouble here. You're not the one that's really done anything wrong." (JA 2187).

Chief Gautier of the Pembroke Police Department received a call that a suspect had been seen breaking into a house nearby and walking towards Blacksburg on

Route 460. (JA 1885). The officers found Mark a short time later walking along Route 460. Upon apprehension, he falsely identified himself as Mark Rader. (JA 1886).

The defendant was placed in a police car while the search for the others proceeded. Chief Whitsett of the Pearisburg Police Department was standing guard alongside the car in which the defendant sat. (JA 2194). At that time, the only crimes the police knew about were the two robberies in Eggleston and Pembroke. (JA 2198). The window was down a few inches and the defendant called him over and asked if Whitsett "would do him a special favor." The defendant asked him if he would put the barrel of the officer's shotgun in the defendant's mouth and pull the trigger. (JA 2196). Whitsett told him he could not oblige and asked the defendant "if I [Whitsett] looked like a murderer?" (*Id.*). Then the defendant said something to prompt Whitsett to ask, "What does a murderer look like anyway?" to which the defendant responded, "me." (JA 2197). The defendant then stated that "he was going to hell to meet his brother" who had committed suicide eight years before. (*Id.*).

The defendant was taken to the Giles County Sheriff's Office and was interviewed by Officer Price. The defendant said he was with his younger brother Mark, Gary Barker and one Mike Rader, and that the others had committed the robberies in Eggleston and Pembroke. (JA 1662-1676). He stated that he was forced at gunpoint to participate in the robberies and he made no mention of the larceny of the guns from Danny Saunders' house or the murder and robbery of Alex DeFilippis. (JA 1666, 1674).

After his interview, Price asked the defendant if he would submit to a Gun Shot Residue test. (JA 1678-1679). The defendant declined the request and began to rub his hands together and on his pants legs. (JA 1679, 1926-1927).

Price then interviewed Gary Barker about the robberies. During the interview Price learned from a police dispatcher that the car they had been driving had been reported stolen and its owner abducted. (JA 1680). Price asked Barker about the car and Barker became "very emotional" and said that "a bad thing had happened." (JA 1681). Both Mark and Gary told the police what had happened, including the fact that the defendant had shot and killed Alex. Gary drew a map directing the officers to the location of Alex's body and later went with Officer Fleet of the Montgomery County Sheriffs Office to the area of the New River where they had discarded Alex's clothing. (JA 1771).

The officers also recovered the murder weapon about seventy-five feet away from Alex's car in a ditch. (JA 1907). The day after the murder, a citizen found Alex's wallet about a quarter of a mile from Alex's car in the direction of Pembroke. (JA 1888).

When the defendant was arrested, he had on his person several coins which had been stolen from Saunders' house. (JA 1920). Alex's watch was recovered from the back of Alex's car. (JA 1780). The bullet recovered from Alex's brain was determined to have the same class characteristics as bullets fired from the .38-caliber revolver stolen from Saunders' house. (JA 3523).

A forensic expert determined that there was blood on the bottom right leg of the defendant's blue jeans that

were worn on December 5, but the amount of blood did not permit a DNA test to be performed. (JA 2018-2019). Blood found on Gary Barker's underwear was determined by DNA testing to be his own blood. (JA 2014). No blood was found on Mark Lilly's clothing. (JA 2007).

At trial, Gary Barker testified against the defendant. (JA 2026 et seq.). Mark Lilly was called to testify but refused to do so under the Fifth Amendment. (JA 2243-2244). The trial court found Mark Lilly to be unavailable for purposes of the hearsay exception for declarations against penal interest (JA 2226-2227, 2244-2245) and permitted the Commonwealth to introduce into evidence Mark Lilly's tape-recorded pretrial confessions made to the police. (JA 2253-2282).

The defendant did not testify in his own defense, but rather put on witnesses to say that Gary Barker had a reputation for untruthfulness (JA 2417, 2627), that Gary had made statements to the effect that he would kill his best friend and anyone who tried to arrest him (JA 2525, 2529), and that the defendant was not seen in actual possession of the stolen guns at certain times. (JA 2384, 2435). The jury returned guilty verdicts on all nine charges. (JA 2784-2785).

During the separate sentencing hearing, the Commonwealth presented both record and testimonial evidence of the defendant's extensive criminal history, including over thirty convictions for crimes ranging from public drunkenness to assaults, breaking and entering, larceny and malicious wounding. (JA 2818-2868). The defendant put on a variety of mitigation evidence, including a mental health expert and family members who

described his childhood and abusive father. Dr. Nelson, a forensic psychologist, admitted that he could not say that the defendant never would commit another violent act. (JA 2921-2922). The jury found Lilly a "future danger" and his crime "vile" in that it involved torture, depravity of mind and aggravated battery, and sentenced him to death. (JA 3017).

During the post-sentencing hearing in which the probation officer's report was considered, the defendant presented the testimony of, among others, Mark Lilly. Mark testified that he had lied to his attorneys and to the police and that it was he, rather than his brother, who had ***robbed*** Alex DeFilippis. (JA 3095-3101). Mark denied shooting Alex, however (JA 3098), stated that he did not know who shot Alex and that he could not say that his brother had not shot him. (JA 3102). At the conclusion of the hearing, the trial court sentenced Lilly in accordance with the jury's verdicts.

ARGUMENT

I. ISSUES PREVIOUSLY RESOLVED

A. Bill of Particulars (Assign. Error 12, 31)

Lilly argues, as he did below (JA 296-300), that he was entitled to notice of what evidence the Commonwealth was going to present and what aggravating factors it intended to rely upon. The trial court properly denied the motion. (JA 299-300; Tr. 1498-1499). *See Clazett v. Commonwealth*, 252 Va. 79, 85, 472 S.E.2d 263, 266 (1996), *cert. denied*, 117 S.Ct. 972 (1997).

B. Photographs and Crime Scene Videotape (Assign. Error 13, 14, 20)

The trial court reviewed the Commonwealth's photographs of the victim as well as the videotape of the crime scene. (JA 313-318). The court excluded the autopsy photographs but admitted the other photographs and videotape into evidence. (JA 320-323). The court's ruling was a proper exercise of its discretion. *See Clagett*, 252 Va. at 86-87, 472 S.E.2d at 267.

C. Constitutionality of Death Penalty Statutes (Assign. Error 33)

Lilly argues that the death penalty is cruel and unusual punishment and that Virginia's aggravating factors are vague. These issues properly were rejected by the trial court. (JA 360). *See Mickens v. Commonwealth*, 252 Va. 315, 320, 478 S.E.2d 302, 305 (1996), *cert. denied*, 117 S.Ct. 2442 (1997).

Lilly also asks this Court to consider other arguments made below but not briefed on appeal. (Def. Br. at 45). This Court expressly should find that the arguments not briefed have been waived in this appeal. *See Williams v. Commonwealth*, 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994) (rejection of attempt to "incorporate by reference" arguments made in trial court), *cert. denied*, 515 U.S. 1161 (1995); *accord Mickens v. Commonwealth*, 247 Va. 395, 401 n.4, 442 S.E.2d 678, 683 n.4, *rev'd on other grounds*, 249 Va. 423, 457 S.E.2d 9 (1995); *Jenkins v. Commonwealth*, 244 Va. 445, 460-461, 423 S.E.2d 360, 370 (1992), *cert. denied*, 507 U.S. 1036 (1993).

II. PRETRIAL RULINGS

A. Jury Selection

1. The Trial Court Did Not Abuse Its Discretion In Striking Six Jurors For Cause. (Assign. Error 1, 2, 3, 7, 8, 9)

Lilly argues that the court erred when it struck potential jurors Huffman, Matheson, Mitchell, Wallace, Ollie Jones and Mumaw due to their views opposing the death penalty. Lilly "concedes" that Matheson, Wallace and Mumaw expressed opinions that they could not impose the death penalty, but contends nevertheless that he was "entitled to a jury of his peers." (Def. Br. at 12-13). Lilly's concession is dispositive of the issue with respect to those three veniremen. While the law generally entitles an accused to a jury of his peers, the law does not entitle him to a juror whose views about the death penalty would substantially impair or prevent the performance of his duties in accordance with his oath and the court's instructions. *Barnabei v. Commonwealth*, 252 Va. 161, 173, 477 S.E.2d 270, 277 (1996) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)), *cert. denied*, 117 S.Ct. 1724 (1997). It being undisputed that Matheson, Wallace and Mumaw could not impose the death penalty under any circumstances, they were not qualified as a matter of law to sit on the jury.[1]

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[1] Matheson said her opposition to the death penalty would prevent her even from ***convicting*** someone of capital murder and that she probably would not consider the death penalty under any circumstances. (JA 721). Wallace said she would choose her strong beliefs against the death penalty over the instructions of the court. (JA 1045). Mumaw said she could not

Lilly's argument with respect to Huffman, Mitchell and Jones also does not demonstrate an abuse of discretion. In *Barnabei*, this Court repeated its settled standard that a ruling to exclude a prospective juror will not be disturbed on appeal unless it constitutes manifest error. 252 Va. at 173, 477 S.E.2d at 277 (citing *Yeatts v. Commonwealth*, 242 Va. 121, 134, 410 S.E.2d 254, 262 (1991), *cert. denied*, 503 U.S. 946 (1992)). The deference due the trial court is based upon the fact that the trial judge sees and hears the prospective jurors and thus is in the best position to determine whether their views would substantially impair or prevent the performance of their duties. *See Barnabei*, 252 Va. at 173, 477 S.E.2d at 277 (citing *Weeks v. Commonwealth*, 248 Va. 460, 475, 450 S.E.2d 379, 389 (1994), *cert. denied*, 116 S.Ct. 100 (1995)).

Huffman stated unequivocally "I don't believe in the death penalty," and that she would "have a problem" considering its imposition. (JA 513). Then, when she immediately answered a question in a contrary manner, the court stated, "in my mind [that] conflicts with what you said earlier. . . . " (*Id.*). Later, when Huffman still seemed to give conflicting answers, or ones that indicated she did not understand the questions, the court questioned her further:

> THE COURT: . . . does your belief prevent you from imposing the death penalty after you hear all the evidence, or do you feel that your opinion or your belief about the death penalty would in fact impair your ability to resolve that issue

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put aside her anti-death penalty views in deciding an appropriate punishment. (JA 1361).

> fairly for both the Commonwealth and the defense. In other words, are you hesitant to impose the death penalty regardless of what the evidence shows you, knowing that you have a lesser punishment which may be available.
>
> MS. HUFFMAN: Right.
>
> THE COURT: Now, do you understand my question?
>
> MS. HUFFMAN: Yes, I understand what you are saying now.
>
> THE COURT: You would find it very difficult?
>
> MS. HUFFMAN: Yes.
>
> THE COURT: Regardless of the evidence?
>
> MS. HUFFMAN: Right.
>
> THE COURT: To impose the death penalty?
>
> MS. HUFFMAN: That's correct.
>
> THE COURT: You could under certain circumstances, but in your heart of hearts you are opposed to the imposition of the death penalty?
>
> MS. HUFFMAN: That's correct.

(JA 525-526).

When the Commonwealth challenged Huffman, the court found that "her opinion or her belief as to the imposition of the death penalty would prevent a fair and impartial hearing in this matter, so I would excuse her for cause. . . . " (JA 544-545). The trial court's finding is fully supported by the record; therefore, Lilly has demonstrated no abuse of discretion in the court's ruling.

Mitchell stated that she had "struggled" with the question of the appropriateness of the death penalty (JA 786), that she could not consider the death penalty because, "religiously I have a hard time with being in a position of taking someone's life." (JA 790). She also stated that, due to her doubts about the issue, she would prefer not to sit on the jury. (JA 801). Finally, the court questioned her about whether her views would impair the performance of her responsibilities and she said they would not. (JA 810). When challenged by the Commonwealth, the court found as follows:

> THE COURT: . . . Gentlemen, I'm frankly concerned about Ms. Mitchell's ability to serve on this jury. I feel she's been very honest in all the questions that have been asked of her, and my opinion she is no doubt wrestling at this point with her feelings as to whether she can impose a death penalty. I interpret some of her answers to indicate that she would not be biased against the imposition of the death penalty in all cases, and she has made statements to that effect. At the same time she has made statements that I interpret that she does not really know what her feelings are at this time as it relates to the death penalty, and I do not think this case should provide her with a laboratory to work through her feelings. I think that is bias to the Commonwealth . . . . when I consider all the answers that she has given to all the questions I would dismiss her for cause.

(JA 811-812). The court's determination that Mitchell had not firmly decided whether or not her anti-death penalty views would substantially impair the performance of her duties is supported by the record. The judge's decision,

based upon what he saw and heard, was a proper exercise of his discretion. *See Spencer v. Commonwealth*, 240 Va. 78, 94, 393 S.E.2d 609, 618 ("The record gives every indication that the trial judge gave close and conscientious attention to the demeanor of the veniremen"), *cert. denied*, 498 U.S. 908 (1990).

Finally, Jones' responses also fully supported the trial court's decision to strike her for cause. Initially, Jones said that, after talking to her minister, she felt she could impose a death sentence. (JA 1340). But increasingly, her responses became more equivocal. (JA 1342: "I think so;" 1343: "I guess"). Then, admitting she had "been under a lot of stress at home" (JA 1343), she stated that she could not be sure whether she could affirm a death penalty due to her religious beliefs. (JA 1348). When challenged by the Commonwealth, the trial court found that "she's very troubled about the possibility of imposing the death penalty" and "I do not feel that she is free of any bias." (JA 1349). Again, these findings by a judge who assessed the demeanor of the juror are supported by the record and well within his discretion to make.

Lilly has failed to demonstrate any manifest error flowing from the trial court's carefully considered rulings regarding these potential jurors. Under Barnabei his claims of error should be rejected.

2. The Trial Court Did Not Abuse Its Discretion By Refusing To Allow Some Questions Which Were Not on the Approved List. (Assign. Error 4)

Lilly argues in conclusory fashion that error occurred when the trial court disallowed voir dire questions that were not on the pre-approved list of questions. Lilly identifies no such instances much less how he was prejudiced. In fact, with few exceptions, both the defense and prosecution agreed what questions would be asked during the selection of Lilly's jury. (JA 365-373).

Before trial, the court had granted Lilly's motion to send out a questionnaire to all prospective jurors that asked for a wide range of information about each one. (JA 3229-3233, 3313). During the voir dire proceedings, the trial court allowed a wide range of questions to be asked. The few times the court cautioned the defense to stay within the approved list of questions simply did not demonstrate any error or abuse of discretion. (JA 917-918).

In *Goins v. Commonwealth*, 251 Va. 442, 457, 470 S.E.2d 114, 124-125, *cert. denied*, 117 S.Ct. 222 (1996), this Court rejected the defendant's claim that the trial court erred when it refused to ask certain questions the defendant had included in a prepared list of voir dire questions. This Court held that as long as the parties can ask questions relevant to the statutory factors defined in Virginia Code § 8.01-358 – relationship, interest, opinion or bias – then the denial of a request to extend the questioning beyond those factors is not error. *See also LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653

(defendant has no right to extend voir dire *"ad infinitum"*), *cert. denied*, 464 U.S. 1063 (1984).

Lilly was not hampered in any way from asking probing questions regarding the statutory factors. The trial court's ruling regarding the issue demonstrates a proper exercise of discretion:

> I know it's a critical case and because I knew it was a critical case I had both the Commonwealth and the defense submit their proposed voir dire questions prior to trial so that the Court in conjunction with the attorneys could review those questions and we did so prior to the commencement of this case and as a result of our meeting together certain questions were found to be improper from both sides. All counsel agreed to that and those questions were omitted, and the other benefit of that is that each side have the benefit prior to trial of knowing what the other attorney will ask on voir dire, and I am not going to go beyond those questions except if a response requires a clarification, and if a response requires a clarification I will let you ask that.

(JA 917-918). Lilly's claim of error simply is foreclosed by the holding in *Goins*.

3. The Trial Court Did Not Abuse Its Discretion By Retaining Jurors Rakes and Shumate. (Assign. Error 5, 6)

Lilly argues that potential juror Rakes was biased against him because he was friends with Chief Whitsett, a Commonwealth's witness, and because he initially stated that he would find Whitsett more credible than a

stranger. (JA 988). However, when the trial judge asked Rakes if he would "automatically give a higher credibility" to the witness, Rakes answered, "I'm not sure that's exactly what I meant." (JA 996). The judge then explained that every witness would be sworn to tell the truth and Rakes explained what he had meant by his initial response:

> I think what I meant was I'd probably start at a different point because you do have some familiarity, some knowledge and some past about the person, maybe you would start with a different feeling when you first began, but I don't know that that would carry on through all the testimony.

(JA 997). The judge asked Rakes the following question:

> If every person who testified before you took an oath to tell the truth could you from that point on weigh every testimony of every witness on the same plane when that witness comes in here . . . would you accept each witness once they take their oath as being on an equal plane with every other witness?

(*Id.*). Rakes answered, "Yes, Your Honor, I would." (*Id.*). When the defendant challenged Rakes, the trial court made the following findings:

> . . . after hearing all the responses by Mr. Rakes of these questions I had the initial concern that you have expressed. That's why I asked him an additional several questions. Once I brought up the topic Mr. Rakes immediately said well I'm glad you brought that up because I somewhat misunderstood the question, and after he explained to me and to you all and in response

> to the additional questions that I asked him I am convinced that he could be completely unbiased in this matter and accept the testimony of all the witnesses once they are put under oath as in an even plane you know once the testify, so for that reason I would seat Mr. Rakes.

(JA 999).

In *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 510 U.S. 848 (1993), this Court held that "we defer to the trial court's decision to exclude or retain prospective jurors because the trial judge has seen and heard each member of the venire, and is in a better position than this Court to decide whether something will prevent or substantially impair a particular person's performance of his or her duties as a juror." *See also Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990)), *cert. denied*, 502 U.S. 824 (1991). Stewart, like Lilly, complained that a juror should have been struck who initially stated she would give more weight to a police officer's testimony. *Stewart*, 245 Va. at 235, 427 S.E.2d at 402. Considering the juror's later answers, however, it was clear that the juror was not disqualified to sit and the trial court's decision to retain her demonstrated no manifest error. *Id.*

Rakes swore that he could consider all witnesses equally and the trial court found that his later answers satisfied the court's early concerns. Under *Stewart*, the court did not abuse its discretion.

Lilly also faults the trial court for retaining prospective juror Shumate because he was the second cousin of Investigator Hamblin, one of the Commonwealth's witnesses. Shumate, however, affirmatively and repeatedly

stated that he would not necessarily believe Hamblin over another witness and that their relationship would make "no difference at all." (JA 1016-1018). The trial judge stated that he "detect[ed] absolutely no trace of a bias" in Shumate and, therefore, denied the motion to strike him. (JA 1019). The record, of course, wholly supports the trial court's finding and, under *Eaton*, that finding must be given deference.[2]

4. The Claim That the Trial Court Erred In Retaining A Juror Who Had Read About The Case Is Procedurally Barred. (Assign. Error 16)

Lilly argues that an unidentified juror who read a certain newspaper article about the case should have been disqualified because the article contained information about Lilly's parole status at the time of the murder. Before the voir dire proceeding began, Lilly brought to the court's attention a newspaper article in that day's paper (October 15, 1996) that, according to him, contained references to statements of Mark Lilly that were the subject of a motion to suppress. (JA 405). Lilly asked the court to disqualify any juror who had read the article. (*Id.*). The trial judge denied the motion, but ruled that

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[2] The defendant's implication that Shumate's second-cousin relationship to Hamblin somehow disqualified him is without any authority. Section 8.01-358 allows a challenge to a juror who is related to a ***party*** or to the ***victim***. *See Salina v. Commonwealth*, 217 Va. 92, 94, 225 S.E.2d 199, 200 (1976). Relation to a witness, in itself, is not grounds for exclusion.

Lilly could examine each juror about what he or she had read. (JA 406-407).

Each prospective juror was questioned individually about what he knew, or had heard or read, about the case. Of the twenty-four jurors qualified for the final panel, only twelve had even heard about the case through the media and nine of those had not read or heard about the case since the crime had occurred a year before trial.[3] Each of the qualified jurors who knew anything about the case from outside sources affirmed that what he had seen, heard or read would have no effect on his ability to sit as an impartial juror. (See note 3 above).

The ***only*** prospective qualified juror who said he had read a newspaper article about the case on the first day of jury selection was juror McGuyer.[4] McGuyer swore that what he had read would not affect his ability to sit impartially (JA 755) and further that he could not even remember any specific details of what he had read about the previous day. (JA 773).

Lilly did not renew his motion after the voir dire proceedings had concluded. However, after the final jury

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[3] The qualified jurors who had obtained information from some media source about the case were Bukowski (JA 419-420); Hyer (JA 547-548, 568-571); McGuyer (JA 772-773); Patty (JA 866); Page (JA 951-952); Rakes (JA 972); Dixon (JA 1125-1126); Gross (JA 1282-1283), and Prosser (JA 1363-1364). Of those, the ones who had not read or seen anything recent on the case were Bukowski, Jones, Lester, Loveday, Page, Rakes, Dixon Gross and Prosser.

[4] The record does not show what article McGuyer read or if it was the article about which Lilly complained on October 15, 1996.

of twelve jurors plus two alternates had been selected, the trial court made the following ruling:

> That completes every motion that I'm aware of except for the motion made by [defense counsel] on Tuesday in which he asked the Court to essentially dismiss the people who had been called in because they were tainted if they had read the Tuesday morning edition of THE ROANOKE TIMES and I believe the record will reflect I took your motion under advisement . . . . [u]ntil the voir dire had been completed and if I recall correctly, I believe there was only one person who was voir dired that had read the article and after listening to her testimony very carefully, I do not feel in anyway that reading that article tainted her view and that she is unbiased and what she read did not affect her impartiality in this case.

(JA 1440-1441).

Lilly now is arguing that an unnamed juror should have been disqualified because he or she was exposed to information in the article about Lilly's prior criminal record, but in the court below his argument was based upon an alleged exposure to his brother Mark's confession. Thus, to the extent Lilly's appellate argument is different from his argument made below, it may not now be considered. *See* Rule 5:25, Rules of the Supreme Court of Virginia. Furthermore, because Lilly did not challenge any qualified juror on the basis of improper exposure to the October 15 article, he has waived his current argument that any such juror should have been disqualified. *See Spencer v. Commonwealth*, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989), *cert. denied*, 493 U.S. 1093 (1990). And,

even if the claim with respect to juror McGuyer had been preserved, it could not result in reversal because McGuyer was an alternate juror who did not participate in the jury's deliberations or decision. Lilly, therefore, could have suffered no harm from his qualification. *See Gray v. Commonwealth*, 233 Va. 313, 339, 356 S.E.2d 157, 171, *cert. denied*, 484 U.S. 873 (1987).

Of course, the claim of error also has no merit because, as discussed above, this Court has held it to be settled law that a trial judge can best determine whether a juror is qualified and free from bias. *See, e.g., Stewart*, 245 Va. at 234, 427 S.E.2d at 402. Here, there can be no question about the propriety of the court's ruling because every qualified juror swore unequivocally that nothing he had heard or read had any effect on his ability to sit impartially. Lilly presents nothing to show that that ruling constitutes "manifest error."

5. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Change of Venue (Assign. Error 10)

Lilly argues, as he did below, that a change of venue was necessary because of pretrial publicity. The trial court took the motion under advisement and, after twenty-four qualified jurors were chosen, overruled it. (JA 207, 1411). The court found as follows:

> . . . we have been able to seat a panel that is completely free of bias, and for that reason I would at this point overrule your motion.

(JA 1411). Defense counsel responded that he did not "necessarily disagree" with the court's finding of lack of

bias, but noted that "every single one of these 24 people" had heard about the case. (*Id.*).

The standard, of course, is not whether jurors have heard about the case, but rather whether the defendant has overcome the presumption that he can receive a fair trial in the jurisdiction where the offense occurred by demonstrating that the "citizens of the jurisdiction feel such prejudice against the defendant as is reasonably certain to prevent a fair trial." *Roach v. Commonwealth*, 251 Va. 324, 342, 468 S.E.2d 98, 108-109, *cert. denied*, 117 S.Ct. 365 (1996). The decision whether to change venue lies within the sound discretion of the trial court, a decision influenced by the amount of difficulty encountered in selecting a jury. *Id.*

Defense counsel also was wrong in his rendition of the facts. The record shows that, until trial, eleven of the final twenty-four jurors had heard ***nothing*** about the case or Lilly. (JA 896, 922, 1001, 1021-1022, 1051, 1074-1075, 1093, 1155, 1183-1184, 1319, 1396). Out of forty-three prospective jurors, ten were struck for cause for reasons unrelated to what they had read or heard about the case. (JA 475, 544, 723, 811-812, 861, 1046, 1273 and 1298, 1349, 1355-1356, 1362). Thus, out of a total of forty-three persons, only nine persons, or one-fifth of the total number called, were excluded due to what they had read or heard. The relative ease with which the court was able to impanel a jury "completely free" from any bias demonstrates that the court did not abuse its discretion in denying the motion to change venue. *See Roach*, 251 Va. at 342-343, 468 S.E.2d at 109.

6. The Trial Court Properly Denied Voir Dire Questions About Parole Eligibility. (Assign. Error 11)

Lilly argues, as he did below, that he had a Fifth and Sixth Amendment right under *Simmons v. South Carolina*, 512 U.S. 154 (1994), to "question or educate" the potential jurors about parole. (JA 12-13). The trial court properly denied the motion. (JA 232-233).

Simmons held that due process requires that the defendant in a "future dangerousness" capital murder case be allowed to tell the sentencing jury, ***by argument or instruction***, that he will be ineligible for parole if sentenced to life and if state law requires such ineligibility. 512 U.S. at 177 (O'Connor, J. concurring). *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (in plurality opinion, fifth concurring vote on grounds narrower than plurality becomes controlling opinion). Simmons involved only the Fourteenth Amendment due process right of rebuttal during sentencing; it had nothing whatsoever to do with the Sixth Amendment right to a fair trial or jury. The trial court thus properly found that Simmons did not apply. (JA 233).[5]

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[5] Of course, the trial court not only gave the sentencing jury a proper *Simmons* ***instruction*** (JA 77ZZ), but also allowed extensive ***argument*** to be presented to the jury on the subject of Lilly's possible parole ineligibility. (JA 3002-3005, 3008-3009, 3012, 3014).

B. Other Rulings

1. The Trial Court Properly Admitted Testimony Describing Lilly's Behavior When Asked to Take a "Paraffin" Test (Assign. Error 15)

Lilly argues that the trial court erred in admitting the testimony of Officers Price and Skidmore in which they described Lilly's reaction to the officer's request that he submit to a Gun Shot Residue (GSR), or "paraffin," test. According to *Lilly*, the officers never should have given him a choice in the matter in the first place, thereby making it somehow "unfair" to use his response against him. Lilly cites *Escobedo v. Illinois*, 378 U.S. 478 (1964), as his only authority, but *Escobedo* is inapposite. *Escobedo* stands for the general proposition that unwarned pretrial statements taken during police interrogation are inadmissible at trial, but no such circumstances existed in Lilly's case. Lilly erroneously states that *Escobedo* stands for the principle that an accused's silence may not be used against him at trial. (Def. Br. at 27).

That principle, enunciated in *Doyle v. Ohio*, 426 U.S. 610 (1976), also is inapplicable here.

The trial court held that the officer's giving Lilly a choice whether to submit to a paraffin test "is not a violation of any constitutional right afforded to the defendant." (JA 1438). That ruling was correct. The prohibition against using an accused's silence against him, identified in *Doyle* as Fifth Amendment error, expressly has been held inapplicable to situations analogous to the refusal to take a paraffin test. In *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), the Supreme Court held that a refusal to

take a blood-alcohol test, after an officer has requested it, "is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."

Here, Lilly was given the *Miranda* warnings and waived his right to remain silent. (JA 334). He was interviewed for twenty-two minutes and the interview was tape-recorded. (JA 338). Deputy Price asked him if he would submit to a Gun Shot Residue test and Lilly refused. (JA 339-340). Lilly immediately began to rub his hands together, an act that, in the deputy's opinion, eliminated the likelihood of obtaining residue evidence. (JA 341, 347).

In response to Lilly's motion to suppress this evidence on the basis of a *Miranda* violation (JA 349-351), the prosecutor properly argued as follows:

> This does not have to do with whether he refused the test. The question is, what were his actions after he refused the test? And are those actions relevant to the case and for something that Mr. Lilly may have know [sic] or desired not to have known. I don't care if we say he said no. . . . He was asked and he began rubbing his hands. That's what the Commonwealth believes is admissible. It's, it has nothing to do with Miranda. Miranda has never been held to say whatever you say or do may be held against you. Only interrogation. He was not interrogated about his hands. He was simply asked, would you consent to a test? Nor, is it a violation of the Fifth Amendment because he was not compelled to do anything, nor was it testimonial. He was rubbing his hands.

(JA 355). The trial court found no law to support Lilly's request for suppression. The court denied the motion, but ruled that Lilly would be permitted to cross-examine the officer about the matter. (JA 1439).

During the trial, Deputy Price testified that he had given Lilly the *Miranda* warnings and had taken his statement. He then asked Lilly if he had fired a weapon and Lilly said he had not. (JA 1676). Price therefore asked Lilly if he would take the GSR test, after which Lilly began to nib his hands together. (JA 1678-1679). On cross-examination, Price acknowledged that he could have obtained a search warrant to require Lilly to submit to the test and that he did not have to give Lilly any option in the matter. (JA 1689). At no point in Price's testimony before the jury was Lilly's refusal to take the test mentioned.

Officer Skidmore also testified before the jury that he observed Deputy Price ask the defendant to take the GSR test. When the prosecutor asked him how Lilly "physically" reacted, Skidmore said, "[h]e, ah, declined the test and started rubbing his hands together. . . . " (JA 1927). The defendant made no objection to this testimony but thoroughly cross-examined Skidmore about what Deputy Price had said to Lilly. (JA 1928-1937).

Clearly, this record demonstrates that, as the trial court found, there was no error. Lilly was given *Miranda* warnings and waived them. He voluntarily answered the officer's questions. His physical reaction to the request that he take the GSR test was observed by two officers. No constitutional rule prevented the officer from asking Lilly to submit to the test or from testifying about Lilly's

reaction. The testimony properly was admitted into evidence and the defendant properly was allowed, through cross-examination, to inform the jury that the officer need not have given Lilly any choice in the matter. The jury thus could afford the testimony whatever weight it deemed appropriate.

2. The Trial Court Properly Admitted Into Evidence The Pretrial Statements Of Mark Lilly. (Assign. Error 17, 18).

Lilly's argument is essentially that the trial court erred in admitting the hearsay evidence of Mark Lilly's pretrial statements as declarations against penal interest because (a) *Chandler v. Commonwealth*,[6] was decided wrongly and (b) Mark Lilly supposedly lied in his pretrial statements. Neither argument has merit.

a. Chandler does not conflict with the Confrontation Clause.

According to Lilly, the rule in *Chandler* – that a declaration against penal interest may be admitted into evidence against a criminal defendant as an exception to the hearsay rule – violates the Confrontation Clause of the Sixth Amendment. Lilly implicitly calls for the overturning of *Chandler* on this ground, but yet offers no analysis or authority other than his observation that until *Chandler* was decided, no Virginia decision apparently had applied

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[6] 249 Va. 270, 455 S.E.2d 219, *cert. denied*, 516 U.S. 889 (1995).

the hearsay exception for declarations against penal interest in cases where the declarations were admitted into evidence ***against*** a criminal defendant. This observation, however, hardly supplies a reason to overturn *Chandler* much less to find a confrontation violation.

The exception for declarations against penal interest has been firmly rooted in Virginia law since 1923. *See Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978) (citing *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923)). In Hines and the cases that followed, it happened to be the criminal defendant who claimed the right to present the hearsay. It does not follow, however, that the hearsay exception is permitted only when sought by the defendant, or even that the exception should be permitted only when sought by the defendant. The most that can be gleaned from the case history in Virginia is that, until *Chandler* the issue never had come up for review in a case where the prosecutor sought the introduction of evidence under the hearsay exception.

Of course, no Virginia case supports Lilly's remarkable proposition that the exception is available only for the defendant and, indeed, *Chandler* expressly held that the rule in *Ellison* and *Hines* applied to declarations against penal interest which were offered by the Commonwealth as evidence against a criminal defendant. *Chandler*, 249 Va. at 279, 455 S.E.2d at 224-225. *Chandler* made no distinction, for purposes of applying the hearsay exception, between cases where the defendant asked for the exception and cases where the Commonwealth asked for it. Moreover, although Chandler did not raise, and consequently this Court did not address, any confrontation issue, no court has held, as Lilly now apparently

proposes, that the Confrontation Clause absolutely prohibits declarations against penal interest from being introduced against a criminal defendant.

Moreover, evidence submitted by the prosecution under this exception routinely has been found to satisfy confrontation concerns. *See, e.g., United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir. 1995); *United States v. York*, 933 F.2d 1343, 1362 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991); *United States v. Workman*, 860 F.2d 140, 141 (4th Cir. 1988); *United States v. Smith*, 792 F.2d 441, 443 (4th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *United States v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978). *See also Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 2437 (1994) (regarding this hearsay exception, Court held "that the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause.").[7]

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[7] Lilly attempts to distance his case from *Chandler* by contending that he not only was faced unfairly with Mark's out-of-court statements, but also with the interrogating officer's statements which, according to Lilly, were proclamations of Mark's truthfulness. The problem with this argument is twofold. First, Lilly was not hampered in any way from cross-examining the interrogators (Price, Hamlin and Fleet) because they all appeared as witnesses at trial. Lilly thus suffered no lack of confrontation with respect to them. Second, the recorded interviews with Mark Lilly do not support the charge that the officers vouched in any way for Mark's credibility. The most that can be said about their part in the recorded sessions is that they were ***encouraging*** Mark to tell the truth.

b. *The Confrontation Clause did not prohibit the admission of Mark Lilly's statements.*

When evidence is admitted under a "firmly rooted" hearsay exception, a court can "infer[] without more" that it is sufficiently reliable to satisfy the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The exception for declarations against penal interest is just such a "firmly rooted" exception. *See York*, 933 F.2d at 1363 (exception "well-rooted" for confrontation purposes); *Workman* 860 F.2d at 141 ("firmly rooted hearsay exception"); *Raia v. Commonwealth*, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996) (exception "firmly rooted" in Virginia).

However, even when hearsay does not fall within a "firmly rooted" exception, its admission into evidence does not violate the Confrontation Clause "if the prosecution establishes that the declarant is unavailable and that the evidence bears 'indicia of reliability' sufficient 'to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Shaw*, 69 F.3d at 1253, *quoting Ohio v. Roberts*, 448 U.S. at 65-66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)) (internal quotation marks omitted). The Confrontation Clause's requirement of "reliability" is the same as the "reliability" required under Virginia law for admission of declarations against penal interest. *See Chandler*, 249 Va. at 279, 455 S.E.2d at 224, *citing Ellison* 219 Va. at 408-409, 247 S.E.2d at 688; *see also York*, 933 F.2d at 1361 (regarding the "reliability" required under the Federal Rules of Evidence and the "reliability" required under the Confrontation Clause,

"[t]here seems little reason to treat the requirement . . . differently in each context"). The trial court here properly found that Mark Lilly's statements met both of these Confrontation Clause concerns.

The trial court found that the statements of Mark Lilly qualified under the exception for declarations against penal interest because Mark was unavailable as a witness[8] and because his pretrial statements clearly were made with the knowledge that he was implicating himself in the crimes. (JA 2226-2227, 2244-2245). The court found the statements reliable and trustworthy based upon "the evidence and exhibits . . . the facts and circumstances" and the existence of a "substantial link" to connect Mark to the crimes other than his statements. (JA 2227). The court also found that the statements did not violate the Confrontation Clause because they were admitted under a "firmly rooted" exception to the hearsay rule. (*Id.*).[9]

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[8] The Commonwealth called Mark Lilly to the stand and he refused to testify under the Fifth Amendment. (JA 2243-2244). The defendant does not contest Mark Lilly's unavailability.

[9] The defendant disingenuously contends that "even the trial court had some trouble in determining whether the statements . . . were against his penal interest when it stated that '. . . the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy.' " (Def. Br. at 38, quoting JA 2227). Obviously, the word "weren't" is either an error on the part of the court reporter or an inadvertent slip of the tongue by the judge, as is evidenced by the court's statement made only a moment before the quoted language, that the exception was for declarations against penal interest, as well as by the fact that Lilly reargued his motion at least ***four*** more times before judgment was entered (JA

The determination of whether a statement against penal interest is reliable lies within "the sound discretion of the trial court, to be determined upon the facts and circumstances of each case." *Ellison*, 219 Va. at 408, 247 S.E.2d at 688; *see also Workman*, 860 F.2d at 144 (in federal court, "[t]he finding of the trial judge on the guarantees of trustworthiness [of the declaration against interest] are subject to the clearly erroneous standard of review"). The trial court's ruling admitting Mark Lilly's statements in this case clearly was not an abuse of discretion.

First, Mark Lilly's pretrial statements qualified under Virginia's three requirements for admission into evidence. *See Morris v. Commonwealth*, 229 Va. 145, 147, 326 S.E.2d 693, 694 (1985) (unavailable witness, self-inculpatory and reliable statement). Mark Lilly invoked his Fifth Amendment right to remain silent and, therefore, was "unavailable" for purposes of the exception. *See Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950). Lilly's statements given to Officers Price, Hamlin and Fleet obviously subjected him to criminal liability and, therefore, were against his penal interest. (JA 2253-2282, 2318-2332). Indeed, the officers expressly warned him before each statement that what he said would be used against him if charges were brought. (JA 2255, 2318). Mark not only admitted that he participated in the Saunders break-in, that he went along with Alex's abduction, witnessed the murder and participated in the subsequent two "getaway" robberies, but he also told the

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2348-2357, 2636-2639, 3022-3025, 3050-3051, 3071-3083) and ***not once*** did he call into question, or rely on, the alleged language attributed to the court at JA 2227.

officers that he knew his statements to them would result in charges of robbery and murder. (JA 2281, 2324). There can be no question about the fact that Mark Lilly knew his statements were against his penal interest."[10]

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[10] Lilly contends that Mark made statements which were internally inconsistent or contradictory to Gary Barker's testimony on essentially minor points. His complaints, however, are all matters which could have been, and in many instances were, pointed out to the jury. (JA 2734-2737, 2746, 2748). The hearsay that may be admitted without violating the defendant's Confrontation Clause rights is that which is sufficient "to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Ohio v. Roberts*, 448 U.S. at 65-66. Lilly's jury had a sufficient basis upon which to determine whether Mark was telling the truth. The statements, therefore, met the threshold "reliability" precondition to admission into evidence. *See Shaw*, 69 F.3d at 1253 ("this trustworthiness requirement – which serves as a surrogate for the defendant's in-court cross-examination – is satisfied if the court can conclude that cross-examination would be of 'marginal utility' " (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)). Furthermore, Lilly's reliance on Mark's post-sentencing hearing testimony in which Mark said he had lied to the officers, should not be considered now because it could not have been considered at the time the trial court ruled upon the admissibility of the statements. To the extent it can be considered at all, it certainly does not undermine the reliability of the original statements. Mark's "recantation" not only was thoroughly impeached by his admission that he was testifying only ***after*** he had been sentenced, ***after*** his family had blamed him for Ben Lilly's conviction and ***after*** his mother filed in court to take away custody of his child (JA 3101-3102), but also by the fact that the "recantation" neither exonerated his brother in the murder of Alexander DeFilippis nor purported to identify the triggerman. (JA 3102-3103). Significantly, Mark's purported recantation did not persuade the court to set aside the jury's verdict.

Finally, Mark's pretrial statements were reliable. The fact that Mark admitted, and took responsibility for, his participation in the crimes indicates their reliability. *See Williamson*, 114 S.Ct. at 2437 (self-inculpatory nature of statement makes it trustworthy); *accord York*, 933 F.2d at 1363. The fact that the statements were given voluntarily to law enforcement officers who tape-recorded them in formal interviews indicates their reliability because Mark surely knew that the officers could and would seek to verify his statements with the surviving victim-witnesses as well as with Gary Barker and the defendant. *See West*, 574 F.2d at 1135 (declarant's interest in gaining favor with the officers "gave him every incentive to be extremely accurate in his reports" because he knew the officers would seek to corroborate and verify his reports).[11] The fact that Mark's statements were corroborated on every material point by the trial testimony of Gary Barker (JA 2025-2150) and the other evidence in the case also demonstrates their trustworthiness. *See Morris*, 229 Va. at 147, 326 S.E.2d at 694 (determination of trustworthiness turns upon whether "there is anything substantial other than the bare confession to connect the declarant with the crime"). Further, the fact that Mark's statements implicated his own brother as the shooter, as opposed to Gary Barker, certainly is a strong indication of their reliability. (JA 2265-2266: in response to Officer Price's request to tell him who did the shooting, Mark stated, "Well, it's kinda hard cause he's my fucking brother man"; JA 2323: in

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[11] Officer Price cautioned Mark to be truthful and take responsibility for his actions because if he did not, the court would not look at the confession "as it should." (JA 2257).

response to Officer Hamlin's statement that they were trying to find out what happened to the murder victim, Mark said, "Yeah. Yeah, Man, something else, too. I'm going to be getting all these charges and that's my brother I'm telling on."). And yet another indication of the reliability of Mark Lilly's statements is the fact that neither Gary Barker nor the defendant, even now, ever has claimed that Mark was the shooter or even that Mark was more culpable than he had indicated in his pretrial statements.

The statements likewise passed Confrontation Clause requirements. As the trial court properly found, the "firmly rooted" hearsay exception provided the reliability requirement of the Confrontation Clause. (JA 2227). *See Ohio v. Roberts*, 448 U.S. at 66. And the statements further fulfilled the reliability or trustworthiness requirement of the Constitution for the same reasons, discussed above, that that requirement under Virginia law was satisfied. *See York*, 933 F.2d at 1361.

c. Any error was harmless.

Lilly's confrontation argument should be rejected because the trial court properly exercised its discretion in allowing the hearsay into evidence and because the hearsay clearly did not violate the Confrontation Clause. However, even if an error had occurred, it would have been harmless in this case. *See Lee v. Illinois*, 476 U.S. 530, 547 (1985) (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against (the defendant]"; *Schindel v. Commonwealth*, 219 Va. 814, 817, 252 S.E.2d 302,

304 (1979) (erroneously admitted hearsay harmless when the content of the out-of-court statement is clearly established by other evidence). Here, the other evidence overwhelmingly proved that Benjamin Lilly committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA2254-2282, 2318-2332).

It was the defendant's car that was used in the initial part of the crime spree and the defendant's car that broke down, necessitating replacement with another vehicle, and such action most likely was undertaken by the owner of the disabled car. When he was apprehended wielding a shotgun, the defendant lied to the police officers about his identity and that of his accomplices, and that deceptive behavior most likely was engaged in by a guilty person. The defendant made incriminating statements: at the apprehension site, the defendant called to his brother to give himself up because he was "not the one who has done anything wrong;" in the police car, he asked Officer Whitsett to kill him and when the officer asked what a murderer looked like, said "me." A forensic examination of the accomplices' clothing found blood on the defendant's pants leg, yet no blood on Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that his guilt was established by evidence independent of the hearsay statements and that the admission of the hearsay, even if erroneous, was harmless beyond a reasonable doubt.

3. The Trial Court Properly Denied the Motion to Suppress Lilly's Statements Made to Officer Whitsett. (Assign. Error 24, 25)

Lilly argues that the trial court erred in admitting into evidence the statement he made to Officer Whitsett while he was sitting in a police car after he had been apprehended. The challenged statement was Lilly's response "me," made after Whitsett asked, "what does a murderer look like?" (JA 263). Lilly says that the response "me," should not have been admitted because Whitsett had not given him warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and because Whitsett's recollection of the response was not clear or positive. Neither argument, however, demonstrates error.

First, there was no *Miranda* error because Whitsett was not required to give the warnings. *Miranda* applies only to "custodial interrogation." Custodial interrogation takes place when an officer expressly questions a suspect in custody with questions he knows are "reasonably likely to elicit an incriminating response." *Jenkins v. Commonwealth*, 244 Va. at 453, 423 S.E.2d at 365 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The police do not "interrogate" a suspect simply by responding to questions initiated by the suspect. *Jenkins* 244 Va. at 453), 423 S.E.2d at 365. A suspect's statements in such situations are considered "volunteered" and outside the strictures of *Miranda*. *See id.; Wave v. Commonwealth*, 219 Va. 683, 693, 251 S.E.2d 202, 208 (*Miranda* does not apply to volunteered statements or to responses to general "on-the-

scene questioning as to facts surrounding a crime" (quoting *Miranda*, 384 U.S. at 477, 478), *cert. denied*, 442 U.S. 924 (1979).

As the trial court found, when Lilly made his statement, "me," he was not being interrogated. (JA 362). Lilly was apprehended and placed in a police car while the officers searched for the other robbery suspects. (JA 258). Whitsett was standing guard by the car when Lilly asked him to come closer and asked Whitsett to do him a "favor." (JA 273). Lilly asked Whitsett to put a gun in his mouth and pull the trigger. *Id.*). Whitsett said, "I can't do that. Do I look like a murderer?" (JA 274). Lilly then said something to prompt Whitsett to ask, "well, what does a murderer look like, anyway?" to which Lilly said, "me." (JA 263, 2197).

At the time this interchange occurred, Whitsett knew only that robberies had occurred in Pembroke and Eggleston. He had no knowledge that any weapon had been fired, much less that a murder had taken place. (JA 271-272, 2198). Whitsett's question, "what does a murderer look like?" was nothing more than a casual response to the line of conversation initiated and volunteered by the defendant. It was not made with any expectation that Lilly would respond in any incriminating manner. Indeed, Whitsett testified that he was not even taking the defendant's comments seriously and was "more concerned with what was going on around" him. (JA 274). The trial court properly found that the *Miranda* warnings were not required. (JA 363).

The trial court also properly found that the evidence supported Whitsett's recollection of Lilly's statement,

"me." (JA 364). Whitsett initially stated that he "thought" Lilly said, "me," and then later confirmed that he "definitely" said "me." (JA 364).[12] In fact, Whitsett was "startled" at Lilly's response and, when he asked Lilly to repeat what he had said, Lilly told him he was "going to hell to meet his brother." (JA 265). The trial court did not abuse its discretion in finding that the evidence could be submitted to the jury for "such weight as the trier of fact deems appropriate." (JA 364). Lilly offers no rationale or authority for a finding of error in admitting the evidence except his own belief that Whitsett's testimony was speculation, an argument that is not supported by the record and certainly does not demonstrate an abuse of discretion.

III. GUILT PHASE RULINGS

A. The Trial Court Did Not Abuse Its Discretion Regarding Evidentiary Rulings.

Lilly makes several claims of error with respect to evidentiary rulings the trial court made during the course of the guilt phase of trial. Evidence is admissible, however, if it has any logical tendency to prove an issue in a case. *Goins v. Commonwealth*, 251 Va. at 461, 470 S.E.2d at 127 (citing *Coe v. Commonwealth*, 231 Va. 83), 87, 340 S.E.2d 820, 8334 (1986)). Relevant evidence may be

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[12] The defendant presented no evidence either at the suppression hearing or at trial that his response was anything other than "me."

excluded only if its prejudicial effect outweighs its probative value, a determination entrusted to the sound discretion of the trial court. *Id.* None of Lilly's evidentiary complaints demonstrates that the trial court abused its discretion.

1. The blood on Lilly's clothing (Assign. Error 22)

A forensic examination of the jeans Lilly was wearing when arrested disclosed a small blood stain on the bottom right leg. (JA 2008). Due to the small amount of blood, it could not be tested to determine whether it was animal or human blood. (JA 2016, 2019).[13] This evidence tended to prove that Lilly, unlike Mark and Gary, was in close proximity to the murder victim at the time of the shooting. The trial court ruled that the evidence was admissible and that the defendant could cross-examine the expert to reveal the obvious limitations of the test results. (JA 1993-1994). This ruling was a proper exercise of the court's discretion.

2. Lilly's prior conviction (Assign. Error 32)

Lilly complains that the trial court erred when it allowed the Commonwealth to submit into evidence a felony conviction order to prove the charge of possessing

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[13] Due to the small amount, the expert had to choose between a "species test" and a DNA test. A "species test" would have consumed the sample, so she elected to do a DNA test. (JA 2019). No DNA results were obtained, however, because of an "amplification" problem in the process. (JA 2016).

a firearm after having been convicted of a felony, instead of allowing the defendant to stipulate to the fact of the prior conviction. Lilly's claim suffers several defects.

First, the record shows that the Commonwealth in fact presented a stipulation to the jury regarding Lilly's prior conviction. (JA 2343). Furthermore, the record demonstrates that the Commonwealth never offered into evidence a conviction order. (JA 2703, prosecutor's closing argument discussing evidence to support charge).

Additionally, although Lilly cites to page 375 of the joint appendix to support his claim, that reference merely contains Lilly's agreement with the court's ruling that the possession charge would be "separated out," a procedure that apparently was not followed. Lilly's claim of error simply is refuted by the record because the trial court in fact admitted the stipulation and no conviction order was introduced.

3. The medical examiner's report (Assign. Error 21)

Lilly argues that the medical examiner's autopsy report should have been excluded as hearsay because the examiner testified at trial. This same argument, however, was rejected in *Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 806 (1982), *cert. denied*, 459 U.S. 1228 (1983), because Virginia Code § 19.2-188 specifically allows for the introduction of the reports. *Fitzgerald* also found that the introduction of the hearsay parts of the report was harmless. In Lilly's case, however, the court allowed into evidence only Dr. Oxley's autopsy report and excluded a local examiner's findings. (JA 1999-2000).

The report that was entered into evidence (JA 2507-3511) contains no hearsay. The court's ruling (JA 1984-1985) was not an abuse of discretion.

4. Joyce Lang's testimony (Assign. Error 26)

Lilly complains that the trial court erred in sustaining the Commonwealth's hearsay objection to testimony from Joyce Lang. The record shows, however, that the Commonwealth withdrew its objection and the court therefore reversed its prior ruling disallowing the testimony and expressly allowed the defendant to present the testimony. (JA 2515-2516). The court's ruling involved testimony from three witnesses, Joyce Lang, Patricia Quesinberry and Warren Nolen. The defendant had proffered their testimonies before the court reversed its ruling. (JA 2503-2513). After the court decided to allow the testimonies, the defense only recalled Quesinberry and Nolen to repeat the proffers for the jury. (JA 1045, 2524). Obviously, error cannot be attributed to the court simply because the defendant chose not to take an opportunity extended by the court.[14]

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[14] Joyce Lange had testified earlier in the defendant's case and had made the statement that was under challenge – that Gary Barker had told her "he could kill his best friend and not even regret it." (JA 2404). At the ***defendant's*** request, the court instructed the jury to disregard the statement (*Id.*), however, the defendant then excepted to the court's instruction (JA 2405). The defendant's actions, both in asking that the jury be instructed to disregard and in electing not to recall Lang when allowed to do so, waive any objection he now has to the omission of Lang's testimony. *See Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988) (defendant not permitted to approbate and reprobate), *cert. denied*, 490 U.S. 1028 (1989).

5. The tape recordings of Mark Lilly's statements (Assign. Error 34)

The defendant objected to the playing of the audiotaped recordings of Mark Lilly's statements because the tapes had not been provided to him before trial. (JA 2228). Lilly argues on appeal that the admission of the tapes violated a pretrial discovery order.[15]

At trial, the prosecutor's unchallenged representation demonstrated that the prosecutor had not had the tapes in his possession before trial because they were in the Giles County prosecutor's office being used in the case there against Lilly. (JA 2230). The prosecutor likewise represented that Lilly's defense counsel also represented Lilly in Giles County and could have heard the tapes in the course of that representation. (*Id.*). And he further represented that the defendant had had the transcripts of the taped statements for months and had never asked to hear the tapes. (*Id.*).

The trial court remedied the situation by allowing the defense all the time they needed to listen to the tapes before they were played for the jury. (JA 2228-2232). The defense in fact listened to them for an hour and fifteen minutes, and then represented to the court that the interview with Officer Price accurately had been transcribed,

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[15] At trial he also argued that the failure to produce the tapes violated *Brady v. Maryland*, 373 U.S. 83 (1963). This claim, not pursued on appeal, obviously was without merit. The tapes of Mark Lilly's statements contained no exculpatory matter and, thus, there was no constitutional duty to turn them over to the defense.

but that with respect to the interview with Officer Hamlin, the tape had been only ninety-seven per cent accurately transcribed due to the fact that there were portions of Mark Lilly's answers which were inaudible and that those portions were not reflected at all in the transcript. (*Id.*). Then, before the Hamlin tape was played for the jury, defense counsel represented that they had discussed the matter and, while the transcripts did not reflect all of Mark Lilly's statements, the statements could be heard on the audiotape. (JA 2314). The court admitted into evidence only the audio tapes. The transcripts of the tapes were used by the jury only as a guide during the playing of the tapes and were removed afterwards. (JA 2283, 2315, 2317).

The trial court's resolution of the matter safeguarded the defendant's rights by assuring that he could review the evidence before its introduction in order to make whatever objections he might have. The tapes contained the same information the defendant had had in his possession for months in the form of the transcripts. Clearly the court did not abuse its discretion in this evidentiary matter.

B. The Trial Court Did Not Abuse Its Discretion In Denying Motions For A Mistrial.

"The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.' " *Briley v. Commonwealth*, 221 Va. 563, 576-577, 273 S.E.2d 57, 65 (1980) (citations omitted). The issue of whether a mistrial should

be granted is a matter that rests within the broad discretion of the trial court and will not be disturbed on appeal absent a clear abuse. *Cheng v. Commonwealth*, 240 Va. 26, 40, 393 S.E.2d 549, 606 (1990); *Spencer v. Commonwealth*, 240 Va. at 94-95, 393 S.E.2d at 619. None of Lilly's motions demonstrates that the court abused its discretion.

1. The display of the photograph (Assign. Error 19)

After the Commonwealth had made its opening statement in the guilt phase, Lilly moved for a mistrial based on the fact that the prosecutor had displayed during his statement a photograph of the victim taken before he was murdered. (JA 1477-1479). Because he waited until after the opening statement had been made to complain about the display, he has waived his claim of error on appeal. *See Beavers v. Commonwealth*, 245 Va. 269, 279, 427 S.E.2d 411, 419, *cert. denied*, 10 U.S. 859 (1993).

In any event, no reversible error occurred because, as the trial court found, there was no "harm done whatsoever" by the display of the photograph of the living victim. (JA 1479). Moreover, the trial court directed the Commonwealth to remove the photograph from further display. *Id.*). Clearly the court did not abuse its discretion.

2. The sequestered witness (Assign. Error 23)

During the cross-examination of Gary Barker, defense counsel asked him if he had read the newspaper that day and Barker said he had read the Roanoke Times. (JA 2109). Lilly then asked that Barker's testimony be stricken

because, as a sequestered witness, he was not supposed to read newspaper accounts of the trial. When the court overruled the motion, Lilly moved for a mistrial that also was overruled. (JA 2112-2114). Before ruling, the court obtained the newspaper, read it, and questioned Barker to ascertain that the paper had not influenced his testimony. (JA 2112). The court found that (1) Barker had not been present when the other witnesses had been admonished not to read the papers, (2) Barker swore nothing in the paper had influenced him and (3) there was nothing in the paper "that could influence his testimony." (JA 2114).[16] The court's ruling was a wholly reasonable exercise of its discretionary powers over the conduct of the trial.

3. The display of the gun (Assign. Error 28)

During the prosecutor's closing argument in the guilt stage, he held the murder weapon in his hand. Defense counsel objected because the gun was pointed at him. (JA 2763). The court responded, "Mr. Tuck, now, that's ridiculous. It's not pointed at you. That's not pointed at you, nor is it pointed at anyone in this Courtroom." (JA 2764). The prosecutor apologized, saying that he "had not meant to point a pistol at anyone." (*Id.*). After the closing arguments had concluded and the jury had retired to deliberate, counsel stated that, based on his objection and

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[16] The defendant admitted at trial that Barker had not been present for the court's admonishments. (JA 2109). Further, he presented nothing at trial (or now) to contradict the court's findings.

the court's reaction, a mistrial was called for. (JA 2772). The court overruled the motion and also counsel's request for a jury instruction to the effect that his objection regarding the gun was "well-taken." (JA 2773-2774).

The court found that the prosecutor's actions were "absolutely unintentional" (JA 2775) and further that, from the court's observation of the jury, nothing the court had said in "any way" adversely affected the jury's ability to be fair to the defendant. (JA 2803-2804). The court noted that it had instructed the jury early on that it should not interpret any remark or ruling by the court as favoring one side or the other and found that there was no reason to believe the jury had not followed that instruction. (*Id.*). The court's ruling quite clearly was not an abuse of its considerable discretion in this matter.

C. The Trial Court Properly Rejected An Instruction On Intoxication. (Assign. Error 27).

The trial court properly rejected the proffered instruction on intoxication because the evidence did not support it. (JA 2674-2676). The court found that, while there was drinking on the part of the defendant, the evidence did not show that he was so intoxicated as to render him incapable of committing a willful, deliberate and premeditated act. (JA 2675). Specifically, the court noted that the defendant was able to follow the arresting officer's instructions, coherently and clearly respond to the interrogating officer's questions, and that he committed the convenience store robbery without signs of intoxication, including holding the knife carefully by the blade end and throwing it so as to land in the floor. (JA

2675-2676). These findings by the trial court demonstrate the correctness of its ruling. *See Jenkins*, 244 Va. at 458, 423 S.E.2d at 368-369 (affirming refusal of intoxication instruction on similar factual basis).

IV. PENALTY PHASE ISSUES

A. The Trial Court Properly Refused The "Reasonable Doubt" and "Residual Doubt" Instructions. (Assign. Error 29, 30).

Lilly admits that there is no authority for his instruction I-1 (JA 77EEE), directing the jury to impose a life sentence if it has a "reasonable doubt" about punishment. The trial court properly found that the burden of proof was covered in the pattern instruction OK which was given. (JA 77TT, 2971). In fact, Lilly's proffered instruction imposed a burden of proof (beyond a reasonable doubt) on the final sentencing decision that is contrary to Virginia law and far more detrimental to the defendant than existing law. In Virginia, the capital sentencing jury is free to impose a life sentence for any reason, even if it has found an aggravating factor to exist beyond a reasonable doubt. *See Buchanan v. Angelone*, 118 S.Ct. ___, 1998 U.S. LEXIS 638 at *15-16 (1998) ("The jury was . . . allowed to impose a life sentence even if it found the aggravating factor proved" through Virginia's pattern sentencing instruction).

The trial court also properly rejected an instruction on "residual doubt." (JA 77CCC, 2976-2977). *See Franklin v. Lynau*, 487 U.S. 164, 173 (1988); *Stockton* 241 Va. 192, 211, 402 S.E.2d 196, 207, *cert. denied*, 502 U.S. 902 (1991).

B. The Sentence Of Death Was Not Imposed Under The Influence Of Passion, Prejudice Or Any Other Arbitrary Factor And It Was Not Excessive Or Disproportionate To The Penalty Imposed In Similar Cases.

Lilly makes no argument that his sentence was either arbitrarily or disproportionately imposed but, pursuant to § 17-110.1, this Court is required to determine whether the sentence was imposed under any improper influence and whether it is disproportionate to sentences in similar cases. The record clearly supports no such findings that the sentence was imposed contrary to law.

The jury found beyond a reasonable doubt that Lilly was a "future danger" and that his crime was "vile" in that it involved torture, depravity of mind and an aggravated battery. (JA 3430). These findings were supported fully by the record. From the age of nineteen, Lilly engaged in serious criminal behavior involving numerous instances of breaking and entering, assaults on law enforcement officers, destroying property and larceny. (JA 2818-2822). In 1992, he was sent to prison for breaking and entering, grand larceny and malicious wounding. (JA 2821). In 1993, he was convicted for escape. (*Id.*). He was paroled on July 10, 1995, and was on parole when he murdered Alex DeFilippis. (JA 2826-2827). This record indisputably demonstrated that he would continue to commit criminal acts of violence that threatened society.

The record also revealed that Lilly murdered Alex DeFilippis without provocation or justification, simply in order to eliminate him as a witness to the robbery of

Alex's car and money. The record shows the brutal, callous and merciless method used by Lilly in the murder: he made Alex strip down to his underwear and socks on a frigid, windy, December night miles away from any help. He psychologically tortured Alex by leading him to believe that he could walk away from his abductors, and then cruelly chasing him down and shooting him three times in the head. Alex suffered before he died, as was evidenced by the zigzagging trail of blood that followed his last steps and by the horrible death pose in which he had his arm raised to defend himself before he finally fell. The senseless torture, depravity of mind and aggravated battery inflicted on this innocent young man fully justified the sentence of death alone. The record in this case discloses no arbitrary factor at work in the imposition by the trial court of the jury's entirely appropriate sentence.

The sentence of death in this robbery/murder case that involved both of Virginia's aggravating factors was not disproportionate to sentences imposed in other similar cases. *See e.g., Clagett v. Commonwealth*, 252 Va. 79, 472 S.E.2d 263 (1996), *cert. denicd*, 117 S.Ct. 972 (1997); *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865 (1983); *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982), *cert. denied*, 460 U.S. 1029 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1982); *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

V. CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

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CERTIFICATE OF SERVICE

On February 9, 1998, three copies of the foregoing Brief for the Commonwealth were mailed to Max Jenkins, Esquire, JENKINS & JENKINS, Post Office Box 886, Radford, Virginia 24141, and Christopher A. Tuck, Esquire, 805 Triangle Street, Post Office Box 11422, Blacksburg, Virginia 24062, counsel for appellant.

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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 1, 3, AND 8

The Attorney General maintains in its brief to the Court that Jurors Huffman, Mitchell, and Jones were properly struck for cause. However, this analysis fails to review the entire voir dire; rather the Attorney General relies on selected portions.

Ms. Huffman states quite clearly that she can perform her duty as a juror. (JA 513):

> THE COURT: Now that's somewhat in my mind conflicts with what you said earlier, so I want to make sure that we are all clear because this is a most important consideration, so let me repeat to make sure if I heard you correctly there is or is not any conflict in your opinions, and the final question I am going to repeat is, do you have personally any opinion, or any belief, that would prevent you from convicting anyone of an offense, in this case capital murder, which is punishable by death. Now I want to know how you reconciled your answer with your last answer?
>
> MS. HUFFMAN: Also that I don't believe in the death penalty, but if I had to be on the case I would be fair in what my decision would be.
>
> THE COURT: All right, because of your belief and your opinion, would that in fact prevent you from imposing the death sentence after you had heard and considered all evidence.
>
> MS. HUFFMAN: I don't think that would be a problem.

(JA 526):

> MR. SCHWAB: Do you feel that you are morally, mentally and physically capable of assuming the responsibility to be called upon to return a possible death penalty verdict?
>
> MS. HUFFMAN: Yes.
>
> MR. SCHWAB: And would it effect you or your family in any way if you were on a jury that found the defendant guilty of capital murder that must consider and perhaps return a death penalty verdict?
>
> MS. HUFFMAN: No.
>
> MR. SCHWAB: That wouldn't affect you?
>
> MS. HUFFMAN: No it wouldn't bother me.

In the matter of Ms. Mitchell, the Attorney General claims that Ms. Mitchell could not consider the death penalty for religious reasons; however, that is not what Ms. Mitchell said. (JA 789):

> MR. SCHWAB: Do you think those standards are high enough for your struggle with the death penalty to allow you to consider both the death penalty and life imprisonment?
>
> MS. MITCHELL: I think so.
>
> MR. SCHWAB: Do you feel that if you found beyond a reasonable doubt that he was a serious threat to society, or in committing this crime that he was vile, or horrible or inhuman, that you could consider imposing the death penalty?
>
> MS. MITCHELL: I believe so.

(JA 791):

> MS. MITCHELL: Oh I admit I would find it difficult to do, but I've never been put in that

position and I guess I've never really searched myself to know what my feelings would be in that regard because I've never been in that position to have to really make a final step on that. I guess if I went through and knew details and knew situations to be proven to me beyond a doubt that I could probably do that, I hate that I can't answer more with definite regard for that, but I would just say that I would hope that I could be that way, that I could do it.

MR. SCHWAB: so you would at least try to figure out what the evidence was?

MS. MITCHELL: Right.

In *Witherspoon v Illinois*, 391 U.S. 510 (1968) the United States Supreme Court held that the state cannot sweep all jurors who express beliefs opposed to capital punishment. *Witherspoon* at 520. Moreover, the United States Supreme Court further stated in *Davis v Georgia*, 429 U.S. 122 (1976) that even excluding one juror simply because of their opposition to the death penalty is reversible error. However, that is exactly what the trial court did in the cases of Ms. Huffman, Ms. Mitchell, and Ms. Jones.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 5 AND 6

The Attorney General's position appears to be that there was no reasonable doubt that either Jurors Rakes or Shumate were qualified to sit on the jury; a position that fails to review the entire voir dire. When Rakes is questioned about his relationship with Chief Whitsett by Lilly the following is stated: (JA 987):

MR. TUCK: If he [referring to Whitsett] was called as a witness in this case do you feel that you could be objective, or do you feel that you might have some inclinations to believe him more than any other witness and Mr. Schwab's told you that all the witnesses when they come in here are supposed to have a clear slate and I am asking you to be honest with yourself, do you feel that you would believe Chief Whitsett more than other witnesses because of your relationship?

MR. RAKES: I think anyone that you know something about or have some information about might seem to be more credible up front than someone you didn't know anything at all about.

MR. TUCK: So you would find his testimony to be a little bit more credible than the average witness, than someone you didn't know, again I am asking you to be honest with yourself?

MR. RAKES: It's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do.

Even when initially questioned by the Court, Rakes still concedes that he would believe Whitsett more than other witnesses. Only after a second long leading question does Rakes give the expected answer. These persuasive suggestions are exactly what this Court has cautioned against in *Breeden v Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976) and *Parsons v Commonwealth*, 138 Va. 764, 773, 121 S.E. 68, 70 (1924).

In Shumate's case he did state that he could set aside his close friendship and the fact that Investigator Hamlin

was his second cousin. However, Shumate's relationship to Hamlin was so close that it would violate Lilly's right to a fair and impartial jury as guaranteed by the United States Constitution Amendments 6th through 14th and the Virginia Constitution Article 1 § 8. Lilly maintains that Investigator Hamlin was a party to this action or so similarly situated and thereby automatically excluded under *Gray v Commonwealth,* 226 Va. 591, 311 S.E.2d 409, (1984). In *Gray* this Court held that a juror cannot sit if he is related within the ninth degree of kinship of the victim of the crime or a party of record. Lilly argues that either Hamlin is a party to this matter or it can be inferred that he is similarly situated that in effect he was a party.

Specifically, Lilly points to the fact that counsel could not obtain Investigator Hamlin's notes regarding this case through a subpoena duces tecum due to the fact that his employer is deemed to be a party to this action. Thereby, Lilly maintains that investigator Hamlin should be considered a party. However, whether under *Gray* or *Breeden* it was reversible error to sit Shumate as a juror.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 24 AND 25

The Attorney General's argument regarding the alleged statement to Whitsett fails to address the fact that there was a break in the conversation and that Chief Whitsett then initiated the conversation. (JA 262 – 263)

> Q. And then you indicated that he was sitting in the police car at the time with the window cracked –
>
> A. Yes, sir.

> Q. Probably about five (5) or six (6) inches, is that correct?
>
> A. Yes, that's my recollection.
>
> Q. Then you asked him, well, what does a murderer look like anyway, is that correct?
>
> A. Something along those lines, yes, sir.
>
> Q. And he said, and he sort of hesitated a moment – and I backed away from the car and I thought him, I thought I heard him say me?
>
> A. That's right.

(JA 273 – 274):

> Q. And that's when you said, do you want to make me a murderer or do you look, do I look like a murderer?
>
> A. I said that, I said, well, you know, I can't do that. Do I look like a murderer?
>
> Q. And then did you move away from the car at that point, or –
>
> A. Yeah, I sort of backed up, so I didn't take him very serious, of course, I was more concerned with what was going on around me as opposed to his questions because we, we thought that there were still some people at large and we were in a secluded area. It was dark and I felt a little uneasy being exposed to the possibility of someone else being out there.
>
> Q. And then he said something else?
>
> A. Yes.

Q. Which you've indicated in your interview and I believe also your testimony at the preliminary hearing where you said – I thought he said me?

A. Yes.

When these two statements are taken into context together it is apparent that Whitsett backed away from the car after he asked Lilly if he (Whitsett) looked like a murderer. Then Whitsett asked Lilly, "what does a murderer look like?" The Attorney General further argues that the question "what does a murderer look like" was not a question that was reasonably likely to elicit an incriminating response. However, the Chief was aware of two *armed* robberies and was concerned that several men were armed and running loose. The United States Supreme Court held in *Rhode Island v Innis*, 446 U.S. 291 (1980) that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response . . . " at *Innis* 301. Under the circumstances it is clear Whitsett should have known that under the circumstances Lilly's response could be incriminating.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 22

The Attorney General maintains that the trial court did not abuse its discretion when it allowed the Commonwealth to introduce evidence of blood being found on Lilly's leg. However, the Attorney General fails to show how having blood on the *back* of the Defendant's pant leg is more probative than prejudicial. Unless the

Attorney General is arguing that Lilly had his back turned when the victim was shot, removing the possibility that Lilly was the triggerman, then the blood did not have probative value leaving only the prejudicial effect. Moreover, the Attorney General fails to address the fact that all of the defendants had killed a goose which had bled profusely and which blood was found on the Defendant's car.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 26

The Attorney General maintains that Barker's statement to Ms. Lang that he could kill his own best friend and never regret it was admissible. However, the trial court only allowed the statement in order to show why Ms. Lang did not allow her son to go along with Barker; the trial court refused to admit the statement for impeachment of Barker or for the truth of the matter asserted.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 34

As to the tapes of Mark Lilly's statements, the Attorney General argues that while the discovery order demanded that the Commonwealth provide the tapes before trial, the Commonwealth was not required to do so because the tapes were in Giles County and that defense counsel had transcripts of the tapes. However, this analysis fails to take into account that one of the taped statements was conducted by *Montgomery County* Investigators Fleet and Hamlin and that Lilly was never tried on

the Giles County charges. Moreover, the charges in Giles were nolle prosequi.

As for the fact that Lilly was provided copies of the transcripts, Lilly argues that tapes can show voice inflections that cannot be transcribed. Moreover, simply allowing Lilly at trial to listen to the tapes was not consistent with the discovery order entered by the trial court.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 17 AND 18

The Attorney General responds that Mark Lilly's statements were admissible under *Chandler* because the statements were reliable and that for the purposes of the Confrontation Clause, a statement against penal interest is a firmly rooted exception to the hearsay rule.

The United States Supreme Court held in *Lee v Illinois*, 476 U.S. 530, 541 (1986) that an accomplice's confession that incriminates a defendant is presumed to be unreliable. Moreover, Virginia Code § 18.2-18 states that "an accessory before the fact or principal in the second degree to capital murder shall be . . . tried . . . as though the offense were murder in the first degree." Thereby any statement Mark Lilly made naming anyone else as the triggerman favored his penal interest by excluding him from Capital Punishment. Moreover, if the Attorney General argument is correct, Mark Lilly could have admitted that all he did was drive on a suspended license, and nothing else, and any subsequent or additional statements naming co-defendants would be admissible as statements made against penal interest.

In *Williamson v United States*, 512 U.S. 594 (1994) held that under the federal rules of evidence, statements such as Mark Lilly's are not admissible. Rather the federal courts recognize the inherent unreliability of a co-defendant's confession when said confession implicated the Defendant. Moreover, the fact that the *Williamson* court ruled an federal rules does not diminish the argument; rather it simply illustrates the general practice of the Supreme Court in avoiding constitutional pronouncements when there is a narrower ground for ruling.

One of the keystones that the Attorney General relies on in attempting to show Mark Lilly's reliability is the fact that they are brothers. However, it is clear that before Mark gives the statement that his brother was the triggerman, he has already attempted to lie to Price in an attempt to place the blame for the Floyd breaking and entering an his brother. (JA 2258) Throughout the interview with Price, Mark showed no such reluctance in blaming every possible criminal infraction on anyone but himself.

The Attorney General argues that Lilly did not have the right to question and inform the jurors during voir dire that parole had been abolished. Lilly calls this Court's attention to *Morgan v Illinois*, 504 U.S. 719 (1992) which held that if a juror believed the mitigating evidence was irrelevant then said juror could not be seated. Lilly maintains that he was entitled to ask the jurors if they knew parole had been abolished and if the juror could more objectively consider life in prison if the Defendant would never become eligible for parole. (JA 367) Lilly maintains that "life means life" is a mitigating factor under *Simmons v South Carolina*, 114 S.Ct. 2187

(1994) and that he should have been allowed to ask prospective jurors if they could consider it.

The Attorney General argues that even if the confrontation clause was violated, that such a violation would be harmless error because there was overwhelming evidence of the Defendant's quilt. The Attorney General points to the fact that the Defendant was wielding a shotgun, however, it is clear that the shotgun was not the murder weapon nor did the Defendant point the weapon at any officer. (JA 248) Another point by the Attorney General is that Lilly told the officers a false name about those who fled the scene, but his brother was later apprehended using that same false name. In addition, the murder weapon was found in the direction where Mark Lilly fled from police.

Other evidence relied on by the Attorney General is the statement that Officer Whitsett thinks he heard. (JA 25-26) Only after Whitsett is called to testify does his recollection change to indicate that he was certain what the Defendant stated. The final piece of evidence relied on is the blood found on Lilly's leg, however the Attorney General does not inform this Court that the blood was found on the back of Lilly's leg. (JA 2008) Having blood, that cannot be identified as being human, on the back of one's pant leg only shows that if it was the victim's blood, Lilly must have had his back turned when the victim was shot, making it nearly impossible for Lilly to have been the triggerman.

REPLY IN SUPPORT OF ASSIGNMENT OF ERROR 32

After reviewing the record, Counsel for Appellant requests that assignment of error 32 be withdrawn from consideration by the Court. After reviewing the Attorney General's brief, the Appellant does not believe that his initial assertion is supported by the record.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be overturned.

Respectfully submitted,

BENJAMIN LEE LILLY,
Appellant

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CERTIFICATE OF SERVICE

We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Reply Brief have been mailed to the Clerk of the Supreme Court

of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia 23219, (804) 786-9527; on this 20th day of February, 1998.

/s/ Christopher A. Tuck
Christopher A. Tuck

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255 Va. 558

Benjamin Lee LILLY

v.

COMMONWEALTH of Virginia.

Record Nos. 972385, 972386.

Supreme Court of Virginia.

April 17, 1998.

Max Jenkins; Christopher A. Tuck (Jenkins & Jenkins, on briefs), Radford, for appellant.

Katherine P. Baldwin, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Benjamin Lee Lilly (Lilly). Lilly was also convicted of lesser offenses arising out of the same occurrence, but does not directly challenge the sufficiency of the evidence to support his convictions for the lesser offenses.

I.

PROCEEDINGS

On April 1, 1996, indictments were returned against Lilly charging that on December 5, 1995, Lilly abducted and robbed Alexander V. DeFilippis, Code §§ 18.2-47 and 18.2-58, carjacked DeFilippis' vehicle, Code § 18.2-58.1, and subsequently murdered DeFilippis as part of the commission of the robbery, Code § 18.2-31(4). Lilly was

also charged with use of a firearm in the principal offenses and for possession of a firearm after having previously been convicted of a felony. Code §§ 18.2-53.1 and 18.2-308.2(A)(i).

Lilly filed pre-trial motions to exclude evidence of a statement he made to Pearisburg Police Chief William Whitsett, to permit voir dire of jurors concerning parole ineligibility issues,[1] to exclude evidence of Lilly's refusal to submit to a paraffin gunpowder residue test, and for a bill of particulars. Lilly also sought to exclude from evidence statements made by Mark Lilly, Lilly's brother and a co-participant in these crimes, asserting that their admission would be a violation of the hearsay rule and of the confrontation clause. The trial court denied all of these motions. Lilly also filed a motion for a change of venue, which the trial court took under advisement pending selection of the jury.

Lilly also filed a discovery request seeking, *inter alia*, "[a]ll alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator . . . in every media in which each such confession or statement may exist." The trial court granted the discovery motion and the Commonwealth supplied Lilly with, among other items, transcripts of the tape-recorded statements of Mark Lilly.

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[1] In addition, Lilly sought to argue parole ineligibility as a mitigating factor and to submit jury instructions on this issue during the penalty phase. The trial court granted these portions of the motion.

Jury selection began on October 15, 1996 and continued over four days. Trial commenced on October 21, 1996 and proceeded for five days, concluding with a jury verdict finding Lilly guilty on all counts of the indictments. The penalty phase of the trial occurred on October 28, 1996, concluding with a jury recommendation of a sentence of death for the capital murder charge and two life terms plus a total of 27 years for the lesser offenses. The trial court entered judgment on the jury's verdict and imposed the sentences by final order dated March 7, 1997.

II.

EVIDENCE

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265, *cert. denied*, ___ U.S. ___, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). Gary Wayne Barker, the Commonwealth's principal witness, shared a room with Mark Lilly. Barker testified that on the day before the murder, he, Lilly, and Mark Lilly were at Lilly's home "drinking" and smoking marijuana. Later, the three men drove to a friend's house to "drink a little bit with him." When they discovered that the friend was not at home, the three men broke into the house and stole several guns, a safe, and a quantity of liquor. They subsequently broke open the safe and divided its contents.

The three men then drove to Radford where they tried unsuccessfully to trade the stolen guns for marijuana. They then went to stay at the home of an acquaintance in Blacksburg. During this time they continued to drink and smoke marijuana.

The following morning, the three men drove over the back roads in the vicinity of Shawsville and Elliston, stopping to fire the stolen guns at some geese and killing one, which they put in the trunk of the car. They again attempted to trade the guns for marijuana at a trailer park and a bar in Blacksburg.

Near Heathwood, the car in which the three men were travelling broke down in the vicinity of a convenience store. They removed the liquor and guns from the car. DeFilippis, who had driven to the store with a friend, was inspecting a tire on his vehicle while his friend went into the store. Lilly, carrying one of the stolen guns, confronted DeFilippis and called for Barker and Mark Lilly to join him. Lilly ordered DeFilippis into DeFilippis' car and Mark Lilly and Barker also got into the vehicle. Lilly then drove the vehicle away from the store and ordered DeFilippis to surrender his wallet.

Lilly drove DeFilippis' car to an isolated point on the bank of the New River near Whitethorne, stopped the car, and ordered DeFilippis to get out. Mark Lilly was carrying one of the stolen guns, a pistol. The other guns were left in the car. Lilly ordered DeFilippis to strip to his underwear and walk away from the car. After throwing DeFilippis' clothing into the river, the three men returned to the car. Lilly took the pistol from Mark Lilly, ran up to DeFilippis, turned him around, and shot him four times, fatally striking him three times in the head and once in the arm.

Lilly returned to the car, leaving DeFilippis' body in the road. Barker and Mark Lilly asked Lilly why he had shot DeFilippis. He replied that DeFilippis had seen

Lilly's face and that "I ain't going back" to the penitentiary.

The three men bought beer with the money they had stolen from DeFilippis and then drove to the McCoy River where they disposed of "anything that might have our prints on it," although they retained the murder weapon and the other guns. They then drove to "a little market" in Giles County, where they robbed the owners of cash and some merchandise.

Determining that the money from this robbery was not sufficient "[t]o get us out of . . . town," they drove to another store, also in Giles County. Barker and Mark Lilly entered that store and attempted to rob the clerk. They were interrupted by the owner who grabbed Barker. Barker broke free and the two men fled to the car. The owner followed them as Lilly drove away. Barker fired one of the guns into the air to let the owner know that they were armed, and he ended his pursuit.

A short time later, the car broke down. As the three men were removing the stolen merchandise from the car, police officers arrived. The three men fled on foot, with Barker and Lilly being captured almost immediately.

One of the officers responding to the report of these robberies was Police Chief Whitsett. While Lilly was sitting in a police car and Whitsett was standing nearby, Lilly asked Whitsett to place his shotgun in Lilly's mouth and pull the trigger. Whitsett refused and asked Lilly "if I looked like a murderer?" In reply to a comment made by Lilly, Whitsett then asked, "what does a murderer look like anyway?" Lilly replied, "me."

Barker and Mark Lilly both told the police about the DeFilippis murder in their statements. In his initial statement to police, Lilly did not mention the murder and maintained that the other two men had forced him to participate in the robberies.

We will recite other relevant facts and proceedings within the discussion of the assignments of error.

III.

ISSUES PREVIOUSLY DECIDED

Lilly has assigned error to the trial court's failure to order the Commonwealth to provide a general bill of particulars prior to trial, as well as a bill of particulars of the aggravating factors upon which the Commonwealth would rely during the penalty phase of the trial. Lilly has further assigned error to the trial court's finding that the Virginia death penalty statute is not unconstitutional. The arguments raised in these assignments of error have been thoroughly addressed and rejected in numerous prior capital murder cases. We find no reason to modify our previously expressed views on these issues. *Clagett*, 252 Va. at 85-86, 472 S.E.2d at 266-67.

IV.

JURY SELECTION

Lilly assigns error to the trial court's refusal to allow him to depart from the trial court's approved list of questions during voir dire. The record shows that the trial court and counsel for the defense and the Commonwealth conferred extensively in advance of the voir dire

concerning the questions to be asked of potential jurors. Lilly has failed to identify any question he was not allowed to ask or to show that any potential juror was not fully questioned. A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity. *Buchanan v. Commonwealth*, 238 Va. 389, 401, 384 S.E.2d 757, 764 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). Lilly has failed to demonstrate that he was in any way prejudiced by the trial court's limiting of the questions which could be put to prospective jurors, and we will not disturb the trial court's determination in this matter. *Id.*

Lilly further asserts that the trial court erred in refusing to permit him to "educate" the jurors on the issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases. He contends that the requirement of *Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994), that the trial court instruct the jury on parole ineligibility requires that the venire be informed on this issue at the outset of trial and that individual jurors may be questioned on their views of this issue. We disagree.

The clear import of *Simmons* is that, once a defendant is convicted of a capital crime, he has, as a matter of due process, the right to have the jury informed of his ineligibility for parole in order that this factor may be weighed by the jury against the finding of his further dangerousness to society. Nothing in *Simmons* even remotely suggests that knowledge of parole ineligibility rules and exploration of potential jurors' opinions on that

subject would be a proper topic for voir dire.[2] The probable confusion and prejudice such an inquiry would cause in the minds of jurors is self-evident. Accordingly, we reject Lilly's contention that he should have been permitted to "educate" and examine the venire on this issue.

Lilly assigns error to the trial court's dismissal for cause of six members of the venire. Each of the prospective jurors expressed strong moral or religious reservations about her ability to impose a sentence of death. Three of the jurors, Connie Huffman, Kristina Mitchell, and Ollie Jones, ultimately agreed, but with some continuing equivocation, that they could follow the trial court's instructions.

In asserting that these jurors should not have been excused, Lilly confines his argument to a discrete portion of the examination of each of them. We must consider the voir dire as a whole, not just isolated statements. *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error. *Stockton v. Commonwealth*, 241 Va. 192, 200, 402 S.E.2d 196, 200, *cert. denied*, 502 U.S. 902, 112

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[2] The record reflects that the jury was properly instructed on parole ineligibility during the penalty phase of the trial and that Lilly was permitted to argue that his parole ineligible status militated in favor of a life sentence.

S.Ct. 280, 116 L.Ed.2d 231 (1991). In the present case, the trial court had the opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial court. Nothing in the record suggests that the trial court abused its discretion in striking these jurors from the venire for cause despite the attempts of the defense to rehabilitate them.

The trial court found that the other three prospective jurors, Ann Mumaw, Leona Wallace, and Janet Matheson, were adamant in their personal opposition to capital punishment and could not impose a death sentence. Lilly contends that by excluding them from the venire, he was denied the opportunity of having a jury of his peers. Where a juror has clearly indicated that she will be unable to follow the trial court's instructions and consider all the available penalties that might be imposed, it is appropriate for the trial court to excuse the juror for cause. *Gray v. Commonwealth*, 233 Va. 313, 334, 356 S.E.2d 157, 168, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). The elimination of such jurors from the venire "does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community." *Id.* at 335, 356 S.E.2d at 169; *see also Poyner v. Commonwealth*, 229 Va. 401, 413-14, 329 S.E.2d 815, 825 (1985).

Lilly assigns error to the retention of three members of the venire over his motion that they be excused for cause. James Rakes stated during voir dire that he was acquainted with Chief Whitsett and that he might give more credence to Whitsett's testimony as a result. Upon further examination, Rakes stated that he could set aside

his acquaintance with Whitsett and consider the testimony of all the witnesses on an equal plane.

Samuel Shumate stated during voir dire that he was a second cousin and "real good friend" of Investigator Ron Hamblin, a prospective witness for the Commonwealth. Shumate testified that his relationship and friendship with Hamblin would not be a factor in considering Hamblin's testimony against that of other witnesses.

Lilly also asserts that an unidentified juror was permitted to remain on the jury panel after having "read a newspaper article about Mr. Lilly's past." Lilly initially objected to the seating of any juror who had been exposed to specific newspaper articles, and this assignment of error apparently relates to a member of the venire who had read one of the articles and was actually seated on the final jury panel. In addressing the issue immediately prior to trial, the trial court reiterated that it accepted the juror's testimony that the article had not prejudiced her.

As noted above, the decision to retain or excuse a juror rests within the sound discretion of the trial court. Here, the trial court had the opportunity to observe these three jurors and evaluate their responses to the questions put to them. Nothing in the record suggests that the refusal to strike these jurors constitutes manifest error by the trial court, and we will not disturb the trial court's exercise of its discretion in these instances. *Stockton, supra.*

Lilly further maintains that juror Shumate should have been excused on the ground that Shumate was

related to a "party" to the suit.[3] Code § 8.01-358; Rule 3A:14(1). With respect to the application of this rule in criminal cases, we have held that, even though the victim is not a party to the proceeding, a person is disqualified from serving as a juror if he is related to the victim. *Jaques v. Commonwealth*, 51 Va. (10 Gratt.) 690, 695 (1853); *see also Gray v. Commonwealth*, 226 Va. 591, 593-94, 311 S.E.2d 409, 410 (1984).

Lilly asserts that Investigator Hamblin is a "party" to this criminal proceeding. Lilly apparently bases this assertion on the fact that this officer's role in the investigation of the crimes in question was significant to the prosecution's case. Although we have not previously addressed this issue, we hold that when the officer's sole role in a criminal prosecution is as a witness, he is not a "party" within the meaning of Code § 8.01-358 and Rule 3A:14(1). Thus, a juror's relationship to such a police officer-witness does not require *per se* dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly. *See State v. Lee*, 559 So.2d 1310, 1317 (La.1990); *State*

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[3] The Commonwealth asserts that Lilly did not raise this issue below and should be barred from raising it for the first time on appeal. Rule 5:25. However, in noting his objection to the trial court's retention of Shumate, Lilly's counsel stated, "This is a relative and this is a friend." "It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case." *Salina v. Commonwealth*, 217 Va. 92, 93, 225 S.E.2d 199, 200 (1976). The objection noted the family relationship and was sufficiently clear to raise the issue of whether the juror could "stand indifferent to the cause." Code § 8.01-358.

v. Hunt, 115 N.J. 330, 558 A.2d 1259, 1267-68 (1989); *Arner v. State*, 872 P.2d 100, 104 (Wyo.1994).

V.

VENUE

After the jury panel was selected, the trial court, which had deferred consideration of the motion, denied Lilly's motion for a change of venue made on the theory that pre-trial publicity had potentially prejudiced the members of the venire. The trial court noted that the selection of the jury panel had not proved difficult, with fewer than half of the jurors stating that they had heard or read about the case, and with none showing particular bias as a result of the pre-trial publicity. Lilly asserts that the trial court erred in not granting the change of venue. We disagree.

A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred. *Stockton*, 227 Va. at 137, 314 S.E.2d at 379-80. In order to overcome that presumption, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial. *Id.* Accordingly, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth*, 242 Va. 264, 274, 411 S.E.2d 12, 18 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at

767-68. The trial court should consider "the difficulty encountered in selecting a jury" as a significant factor in determining whether actual prejudice has resulted from the publicity. *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The record here adequately reflects that the trial court acted well within its sound discretion in denying a change of venue in light of the ease with which a qualified jury panel was selected.

VI.

GUILT PHASE

A. *Commonwealth's Use of Photographs and Videotape*

During its opening statement, the Commonwealth displayed an enlarged "in life" photograph of the victim to the jury. At the conclusion of that opening statement, Lilly made a motion for a mistrial, asserting that the photograph showing the victim alive was inherently prejudicial because it tended to invoke sympathy for the victim. The trial court found that there was no prejudice to the defendant as a result of the use of the photograph and overruled the motion, but directed that the Commonwealth remove the photograph from further display. Lilly assigns error to the trial court's failure to grant a mistrial.

Lilly cites no authority for the proposition that photographs of the victim taken before his death are inherently prejudicial, an issue not previously addressed in this Commonwealth. Those jurisdictions that have considered the issue have held that there is no inherent prejudice in the use of in life photographs of the victim,

especially where the jury will also view crime scene photographs showing the victim. *See, e.g., State v. Broberg*, 342 Md. 544, 677 A.2d 602, 610 (1996). Thus, the use of in life photographs is a matter committed to the discretion of the trial court unless clearly prejudicial. *Id.*; *State v. Brett*, 126 Wash.2d 136, 892 P.2d 29, 41 (1995); *cf. Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 158 (1978) (in life photographs of victim with his handicapped daughter were prejudicial). We hold that it was within the sound discretion of the trial court to determine that Lilly was not prejudiced by the limited display of the in life photograph of the victim, and we find no abuse of that discretion in this instance.

Lilly assigns error to the admission of certain other photographs and the trial court's denial of his request that black-and-white photographs be substituted for color photographs. These photographs depicted the crime scene of the murder, including graphic images of the victim.

A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime. *Clozza v. Commonwealth*, 228 Va. 124, 135, 321 S.E.2d 273, 280 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. *Williams v. Commonwealth*, 234 Va. 168, 177, 360 S.E.2d 361, 367 (1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The record shows that the trial court reviewed the photographs proffered as potential exhibits by the Commonwealth and excluded the autopsy photographs, which it found excessively graphic. We find no abuse of discretion in the admission of the crime scene photographs, since these accurately depicted the scene of the crime. Similarly, it was within the sound discretion of the trial court to determine whether the probative value of color photographs outweighed the potential prejudice of their content.

Lilly also assigns error to the admission of a videotape of the crime scene of the murder. Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime. *Spencer v. Commonwealth*, 238 Va. 295, 312, 384 S.E.2d 785, 796 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990); *Stamper v. Commonwealth*, 220 Va. 260, 270-71, 257 S.E.2d 808, 816 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). If the videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking. *Goins v. Commonwealth*, 251 Va. 442, 459, 470 S.E.2d 114, 126, *cert. denied*, 519 U.S. ___, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion. *Id.* We find no abuse of discretion in the admission of crime scene videotape here.

B. Admission of Mark Lilly's Statement

At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.

In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."

To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." *Boney v. Commonwealth*, 16 Va.App. 638, 643, 432 S.E.2d 7, 10 (1993); *see also Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).

To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. *Chandler v. Commonwealth*, 249 Va. 270, 278-79, 455 S.E.2d 219, 224-25, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. *Id.*

Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to *Chandler*, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, *Chandler* improperly enlarged the exception to permit the Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that *Chandler* was wrongly decided and should be overturned. We disagree.

We recognize that *Ellison*, *Newberry*, and other cases that applied this hearsay exception prior to *Chandler* involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in Ellison, the admission of such statements

> must be left to the sound discretion of the trial court, *to be determined upon the facts and circumstances of each case*. But, in any case, once it is established that a third-party confession has

> been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of *Hines* [*v. Commonwealth*, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime."

219 Va. at 408-09, 247 S.E.2d at 688 (emphasis added).

Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree.

The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219-20, 27 L.Ed.2d 213 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process.' " . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.

White v. Illinois, 502 U.S. 346, 356-57, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting

Mark Lilly's statements into evidence.[4] *See Randolph v. Commonwealth*, 24 Va.App. 345, 353, 482 S.E.2d 101, 105 (1997); *Raia v. Commonwealth*, 23 Va.App. 546, 552, 478 S.E.2d 328, 331 (1996).

Lilly further asserts that the Commonwealth was permitted to play tape recordings of Mark Lilly's statements to the jury, whereas it had only supplied Lilly with transcripts of those statements in response to Lilly's discovery request. The record reflects that the trial court offered defense counsel the opportunity to review the recordings before they were played to the jury. Assuming, without deciding, that the discovery motion and subsequent order of the trial court required disclosure of duplicate tapes rather than transcripts, we hold that Lilly was not prejudiced by the failure of the Commonwealth to do so. Having been supplied with accurate transcripts of the tape recordings prior to trial and having had an adequate opportunity to review them before they were played to the jury, there is no reasonable probability that the proceeding would have been different had duplicates of the tapes been provided to Lilly prior to trial. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985); *Robinson v. Commonwealth*, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986); *Briley v. Commonwealth*, 221 Va. 563, 576, 273 S.E.2d 57, 65 (1980).

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[4] Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

C. Admission of Lilly's Statement to Chief Whitsett

Lilly assigns error to the admission of Chief Whitsett's testimony that Lilly said "me" when Whitsett asked Lilly "what does a murderer look like anyway?" Lilly asserts that Whitsett's conversation with him constituted a custodial interrogation prior to Lilly's having been informed of his right to counsel and his right against self-incrimination.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). Lilly's statement was clearly not the result of a custodial interrogation in that he initiated the conversation and the statement was voluntary. We hold, therefore, that the trial court did not err in permitting this statement into evidence. *Massie v. Commonwealth*, 211 Va. 429, 431-32, 177 S.E.2d 615, 617 (1970).

Lilly further asserts that Whitsett's testimony was unreliable since in preliminary testimony Whitsett testified only that he "thought" Lilly had said "me." Whitsett testified at trial that he was certain of what Lilly said. Lilly was not prohibited from cross-examining Whitsett concerning his certainty as to the statement. Thus, it was a matter for the jury to weigh and determine. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982).

D. Miscellaneous Evidentiary Rulings

Over Lilly's objection, Lieutenant Gary Price of the Giles County Sheriff's Office was permitted to testify that Lilly declined to submit to a gunpowder residue test and then began rubbing his hands together. Price testified that since he believed a gunpowder residue test constituted a search requiring a warrant or the consent of the suspect, he had informed Lilly that the test was voluntary. Price further testified that Lilly's rubbing his hands together would get rid of gunpowder residue.

Lilly concedes that he could have been required to take the test. However, Lilly contends that, because he was told that the test was "voluntary," the evidence of his refusal amounts to a use of a defendant's silence as an admission of guilt.

We will assume, without deciding, that evidence of a defendant's refusal to submit to a gunpowder residue test after having been informed, erroneously, that the test was voluntary, is inadmissible as a violation of the Fifth Amendment right against self-incrimination.[5] Under the circumstances of this case, however, that error was harmless beyond a reasonable doubt. The record shows that Lilly fired one or more of the guns taken in the breaking and entering prior to the murder. Thus, the gunpowder

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[5] See *Herring v. State*, 501 So.2d 19, 21 (Fla.Ct.App.1986) (informing defendant that gunpowder residue test is voluntary permits defendant to refuse test). *But see Wilson v. State*, 596 So.2d 775, 777-78 (Fla.Ct.App.1992) (criticizing and distinguishing *Herring*); *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, 355 (1981) (permitting evidence that defendant refused to submit to gunpowder residue test without attorney present).

residue test would have been positive for that reason alone, and the jury was aware of that circumstance. In addition, we hold that Lilly's act of rubbing his hands together in an apparent attempt to destroy any gunpowder residue on his hands was a nonverbal act that went beyond the mere refusal to submit to the test and, as such, was not subject to exclusion under the right against self-incrimination. *Accord Salster v. State*, 487 So.2d 1020, 1021 (Ala.Crim.App.1986) (defendant's nonverbal conduct in secreting contraband was not constitutionally protected); *see also Stevenson v. Commonwealth*, 218 Va. 462, 465, 237 S.E.2d 779, 781 (1977) (nonverbal conduct may be treated as an assertion).

Lilly also assigns error to the admission of evidence that dried blood was found on the back of his pant leg. Lilly contends that the location of the bloodstain was inconsistent with its having resulted from the murder because the Commonwealth alleged Lilly was facing the victim at the time Lilly shot the victim. Lilly further asserts that no test was conducted to determine whether the blood was of human origin, and that it is as likely that this blood came from the geese that the men shot earlier in the day. Therefore, he asserts that the trial court abused its discretion in admitting this evidence. We disagree.

The presence of bloodstains on Lilly's clothing was probative, however slightly, of his involvement in the murder. The lack of a scientific determination that the blood was from a human source was a matter of the weight and credibility, if any, of that evidence for the jury to consider. The record does not show that Lilly was

prohibited from questioning the Commonwealth's witnesses on this matter. Accordingly, we hold that admission of this evidence was not error.

Lilly objected to the introduction of the medical examiner's report on the ground that it contained references to tests not performed by the proponent of the report. The Commonwealth responds that the trial court excluded from evidence a local medical examiner's report, admitting only the report prepared by the proponent or his staff. To the extent, if any, that the contents of the report admitted fell outside the exception to the hearsay rule provided for medical examiners' reports under Code § 19.2-188, we hold that Lilly has failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence, and that in light of the other proof in the record, its admission was harmless beyond a reasonable doubt. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 807 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983).

Lilly assigns error to the trial court's refusal to admit a statement made by Barker to a friend to the effect that Barker would be able to kill his best friend and feel no remorse. The record reflects, however, that Lilly initially objected to the statement's admission, then later sought its admission over the Commonwealth's objection. After the Commonwealth subsequently withdrew its objection, the trial court reversed its ruling to exclude the statement, but Lilly failed to recall the witness. Accordingly, we hold that this issue was not properly preserved for review.

E. Witness Sequestration Issue

Barker, who had not been present when the trial court admonished the other witnesses to refrain from reading or observing media reports about the trial, testified that he had read a newspaper article the morning before he testified. The trial court reviewed the article and questioned Barker, who testified that nothing in the article affected his testimony. Lilly assigns error to the trial court's refusal to strike Barker's testimony.

Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court. *Hampton v. Commonwealth*, 190 Va. 531, 553-54, 58 S.E.2d 288, 297 (1950). We cannot say that the trial court abused its discretion in refusing to strike the evidence of a witness who was not aware of the sequestration order and testified that the exposure to the newspaper article did not affect his testimony.

F. Jury Instruction Issue

Lilly assigns error to the trial court's refusal to grant his proposed instruction on voluntary intoxication. The facts, however, did not warrant the proposed instruction.

> Generally, voluntary intoxication is not an excuse for any crime. The only exception to this general rule is in cases involving deliberate and premeditated murder. Mere intoxication will not negate premeditation. However, when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing.

Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988) (citations omitted).

Here, Lilly was able to operate an automobile both before and after the murder. During his flight immediately after the murder, he committed robberies to facilitate his continued flight and took steps to deliberately conceal his involvement in the murder. All of these actions suggest that he was fully in command of his faculties and acted with deliberation. Nothing in the evidence suggests that he was so intoxicated as to be unable to form the requisite intent to commit premeditated murder. Accordingly, the trial court properly refused the proffered instruction on voluntary intoxication.

G. Prosecutorial Misconduct

Lilly assigns error to the trial court's refusal to grant a mistrial after the Commonwealth's Attorney allegedly pointed the murder weapon at Lilly and his counsel during closing argument. After making a cursory statement that the action of the prosecutor was prejudicial, Lilly addresses the remainder of his argument to the trial court's statement, "[T]hat's ridiculous. [The gun is] not pointed at you . . . nor is it pointed at anyone in this Courtroom," contending that it was an intentional disparagement of Lilly's counsel. This argument was not raised below, and may not be raised for the first time on appeal. Rule 5:25.

VII.

PENALTY PHASE ISSUES

Lilly assigns error to the trial court's refusal to grant a penalty phase instruction directing the jury to consider "residual doubt" of guilt in considering the sentence. We have previously held that such an instruction is inappropriate. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207. Lilly also sought an instruction directing the jury to "impose the lower grade" of punishment if there was a reasonable doubt as to the grade of punishment to be imposed. The trial court properly ruled that this instruction was both confusing and redundant of an instruction already accepted by the trial court which directed the jury that the Commonwealth was required to present evidence beyond a reasonable doubt of the existence of one or both of the aggravating factors necessary for imposition of the death penalty.

VIII.

SENTENCE REVIEW

Under Code § 17-110.1(C)(1) and (2), we are required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Lilly makes no particularized argument that passion, prejudice, or any other arbitrary factor influenced the

jury's decision, and we find nothing in the record that would support such a finding.

In conducting our proportionality review, we must determine "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). We have examined the records of all capital murder cases reviewed by this Court, including those cases in which a life sentence was imposed. We have given particular attention to those cases in which, as here, the death penalty was based on both the "future dangerousness" and the "vileness" predicates.

Based on this review, we conclude that Lilly's death sentence is not excessive or disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes. *See, e.g., Gray*, 233 Va. at 354, 356 S.E.2d at 180; *Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294, *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

IX.

CONCLUSION

We find no reversible error in the judgment of the trial court. Having reviewed Lilly's death sentence pursuant to Code § 17-110.1, we decline to commute the sentence of death. Accordingly, we will affirm the trial court's judgment.

Affirmed.

IN THE SUPREME COURT OF VIRGINIA
at Richmond

BENJAMIN LEE LILLY, Appellant, v. COMMONWEALTH OF VIRGINIA Appellee.	)	Record Nos. 972385 & 972386

PETITION FOR REHEARING

COMES NOW the Appellant, Benjamin Lee Lilly, by counsel, and pursuant to Rule 5:39 of the Rules of the Supreme Court of Virginia petitions this Court for a rehearing on the issues described below.

I. THE COURT ERRED IN UPHOLDING THE ADMISSION OF MARK LILLY'S OUT OF COURT STATEMENT

This Court's conclusions regarding the admissibility of Mark Lilly's out of court statements were unreasonable conclusions of law and applications of fact, and left uncorrected violations of Benjamin Lilly's Sixth Amendment right to confrontation and Fourteenth Amendment right to due process.

Case after case in the Supreme Court of the United States makes clear that portions of hearsay declarants' statements which are inculpatory of the accused must be subject to the Sixth Amendment right to confrontation and cross-examination. In *Douglas v. Alabama*, 380 U.S.

415 (1968), the Supreme Court held that the prosecutor's reading of a nontestifing codefendant's statement inculpatory of the accused under the guise of refreshing his recollection violated the Confrontation Clause. The Court later recognized that the violation in *Douglas* was not as serious as it was in a case in which the statement was actually offered as substantive evidence. *Bruton v. United States*, 391 U.S. 123 (1968). In that case, like Lilly's. the codefendant's statement was admitted as substantive evidence.

> Even greater, then, was the likelihood that the jury would believe [the declarant] made the statements and that they were true – not just the self-incriminating portions but those implicating Petitioner as well. Plainly, the introduction of [the declarant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since [the declarant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Bruton, 391 U.S. at 127-128. The Court reiterated its objections to the use of a codefendant's hearsay statements as substantive evidence against the accused in *Lee v. Illinois*, 476 U.S. 544 (1986) (Sixth Amendment violated where presumptively unreliable statement of codefendant introduced against accused at joint bench trial).[1] Despite this

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[1] This Court relies on *Raia v. Commonwealth*, 23 Va. App. 546, 478 S.E.2d 328 (1996), in support of its conclusion that the trial court's admission of Mark Lilly's statement was not in error. The *Raia* Court attempts to avoid the clear dictates of *Bruton* and *Lee* by arguing that those cases involved joint trials.

clear guidance from the Supreme Court, this Court found Mark Lilly's statements admissible.[2]

a. The statement against interest exception is not "firmly rooted"

Hearsay may be admitted without violating the Confrontation Clause if it falls into a "firmly rooted" hearsay exception. *Ohio v. Roberts*, 448 U.S. 56 (1980). No "firmly rooted" exception is present in Lilly's case. Those exceptions which the Supreme Court has deemed to be "firmly rooted" are those which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection [of the Confrontation Clause]'." *Ohio v. Roberts*, 488 U.S. at 66 (1980), *quoting Mattox v. United States*, 156 U.S 237, 244 (1895). As this Court noted, "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Slip Op. at 21,

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Id. at 549, 478 S.E.2d at 330. In neither case did the Supreme Court provide such a basis for limiting their holdings. It is clear that the damage done by the inability to cross-examine a witness against the accused is unaffected by whether or not the witness is being tried in the same action. Each and every argument underlying *Douglas*, *Bruton*, and their progeny is applicable to the instant case.

[2] Without acknowledging *Douglas*, *Bruton*, or *Lee*, this Court relies on *White v. Illinois*, 502 U.S. 346 (1992). *White*, however, does not concern the presumptively unreliable statements of a codefendant. *White* considers only whether to impose an unavailability requirement on the hearsay exceptions of excited utterance and statements made in the course of medical treatment.

quoting White v. Illinois, 502 U.S. 346, 357 (1992). The Supreme Court has found numerous hearsay exceptions to be firmly rooted. *Ohio v. Roberts*, 448 U.S. at 66 n. 8 (dying declarations, business records, public records) (internal citations omitted)); *California v. Green*, 399 U.S. 149, 165-168 (1970) (preliminary hearing testimony); *Manchus v. Stubbs*, 408 U.S. 204, 216 (1972) (prior trial testimony); *Mattox v. United States*, 156 U.S. 237, 244 91985) (first trial testimony). The Supreme Court has not found, however, that the statements against interest exception qualifies for this status. *Williamson v. United States*, 512 U.S. 594, 605 (1994).

In fact, far from suggesting such statements are inherently reliable, the Supreme Court has found that statements of codefendant shifting blame to other defendants are *presumptively unreliable*. *Lee v. Illinois*, 476 U.S. at 543. A presumptively unreliable statement cannot be the basis of a "firmly rooted" hearsay exception. *See, e.g., Douglas v. Alabama, supra*, 380 U.S. 415; *Bruton v. United States, supra*, 391 U.S. 123; *Lee v. Illinois, supra*, 476 U.S. 544; *Williamson v. United States, supra*, 512 U.S. 594.

b. Mark Lilly's statement was not a statement against interest

Even if the statement against interest exception is deemed to be firmly rooted, this Court's conclusion that those portions of Mark Lilly's statements exculpating himself and inculpating Benjamin Lilly as the triggerman

constituted statements against interest is patently unreasonable[3]. The notion that statements against interest should be admitted as hearsay is grounded in the belief that reasonable people will not make self-inculpatory statements that are not true. *See Williamson v. United States*, 512 U.S. at 603-604. Thus, there is no basis to vest self-*ex*culpatory statements with *any* indicia of credibility not afforded ordinary hearsay. The suggestion that these exculpatory statements are somehow more credible as a result of their proximity to inculpatory statements has been expressly rejected by the Supreme Court. "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson v. United States*, 512 U.S. at 599.[4]

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[3] Lilly notes that the Commonwealth retains a great deal of control over whether a criminal defendant will be unavailable for purposes of invoking the statements against interest exception. If the Commonwealth believes that the value to the prosecution of one codefendant's statements will diminished by exposure to cross-examination, it can simply delay the codefendant's trial him that when he takes the stand in his codefendant's trial he will avoid cross examination by invoking his right to silence. The prosecution thereby gains the advantage of admitting the statement without exposure to cross-examination.

[4] This Court has attempted to avoid the dictates of *Williamson*, which held that a statement like Mark Lilly's was not admissible under the federal rules, by arguing that the entire decision was inapplicable because it was based on a federal rule. *Chandler v. Commonwealth*, 249 Va. 270, 279, 455 S.E.2d 219, 225, *cert. denied*, 516 U.S. 889 (1995). Such reasoning may be persuasive with regard to any Confrontation Clause arguments, but the Court's language regarding the meaning of the statements against interest exception is still persuasive.

The Supreme Court has held that statements of codefendants are "presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread the blame, curry favor, or divert attention to another." *Lee v. Illinois*, 476 U.S. at 545. As Justice O'Connor has pointed out "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially the truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States*, 512 U.S. at 599-600. Mark Lilly was trying to shift blame to Benjamin Lilly for the far more serious crimes while he implicated himself in more minor criminal activity. That is clear, not only from his statement, but also from the fact that *Mark Lilly admitted that was his intention*. A. 3096. As the Court found in *Lee*,

> Even Justice Harlan, who was generally adverse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption."

Lee v. Illinois, 476 U.S. at 541-542, quoting *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Mark Lilly's testimony has withdrawn any basis the Court could have for assuring his authorization or adoption of the original statement. His testimony is also is powerful evidence of the effect cross-examination would have had to benefit Lilly.

c. This Court's analysis of reliability was flawed

This Court held that Mark Lilly's statement was reliable because aspects of the statement were "independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." Slip op. at 20 (no record citations provided). The Supreme Court has expressly held that such comparisons of the out of court statement with other evidence are insufficient to find the statement reliable. *Idaho v. Wright*, 497 U.S. 805 (1990). The Court held that to support a statement's reliability on this basis "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial," and that the existence of such collateral corroboration "would be no substitute for cross-examination of the declarant at trial." *Id.* at 823. The *Wright* court concluded that the reliability of the out of court statement must be based on the "totality of the circumstances that surround the making of the statement." *Id.* at 820. Subject to this proper test, the unreliability of Mark Lilly's statement is manifest. The record reflects that Mark Lilly made his statement because he was scared when the interrogating officer began to threaten him with life sentences and decided to "(t)hrow it off on somebody else." A 3096. Furthermore, any reliance by this Court on *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.2d 843 (1923), is misplaced. In *Hines*, this Court determined that a statement against interest was admissible so long as there was something "substantial other than the bare confession to connect the declarant

with the crime." *Id.* at 748, 117 S.E.2d at 849. This standard was obviously intended to govern the admissibility of confessions of declarants which exculpated the accused. Because the government, against whose case such a statement would be admitted, has no constitutional right to confrontation, such a forgiving standard is appropriate. A standard governing admission of statements which will divest the defendant of his constitutional right to confront the witnesses *against* him, however, must surely be higher.

d. Mark Lilly's statement does not bear sufficient indicia of reliability under any test

Even It the Court determines it was correct to consider external evidence to determine the reliability of Mark Lilly's statement, its conclusion based on the facts was absolutely unreasonable.[5] The Court makes its bare conclusion that Mark Lilly's statement is corroborated by other evidence without any citation to or support in the record. In fact, the record contradicts this Court's conclusion in many respects.

First, Mark Lilly's statement is *not* consistent with the physical evidence at the scene. The only physical evidence at the scene was the victim's glasses and Mark Lilly's money clip. A. 1591-92, 1605. Mark Lilly stated,

[5] Lilly notes that this Court was unable to make a reasonable determination of the totality of the circumstances on appeal as it is prohibited from considering any facts not favorable to the Commonwealth. Slip Op. at 3.

however. that he never got out of the car while at the scene.

Second, Mark Lilly's statement is *not* consistent with Gary Barker's testimony. Mark Lilly stated that he was unaware of how the victim became undressed because he (and Barker) never exited the car. Gary Barker stated that be and Mark Lilly both exited the car and laughed at the victim's state of undress. A. 2062. Mark Lilly stated that the victim was shot from a distance of ten to fifteen yards. A. 2268. Gary Barker stated that the victim was shot at point blank range. A. 2148.

Third, the Court's assessment of the credibility of Mark Lilly's statement ignores entirely Mark's Lilly's own testimony that he *made the statement because he was scared and wanted to put the blame onto somebody else.* A. 3096.

II. THE COURT ERRED REGARDING THE VOIR DIRE OF JURORS REGARDING PAROLE INELIGIBILITY

The trial court's refusal to allow Lilly to voir dire the jury regarding the possibility of a sentence of life without parole violated three interrelated, fundamental requirements in death penalty cases: reliability. mitigation, and confrontation. *See Skipper v. South Carolina,* 476 U.S. 1 (1986); *Lockett v. Ohio,* 438 U.S. 586 (1986); *Gardner v. Florida,* 430 U.S. 349 (1977). It is a well established Eighth Amendment requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death penalty]." *McCleskey v. Kemp,* 481 U.S. 279, 306 (1987); *Lockett,* 438 U.S. at 605; *Skipper,* 476 U.S. at 5. "[The Court

has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Walton v. Arizona*, 497 U.S. 639, 649 (1990); *see also Mills v. Maryland*, 486 U.S. 367, 374-75 (1988) ("[T]hat 'the sentencer may not . . . be precluded from considering "any relevant mitigating evidence" ' is . . . 'well established.' ") (citations omitted); *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("[T]he jury [should] have as much information before it as possible when it makes the sentencing decision.").

Counsel and the court must be able to ensure that jurors will be selected who are able to give effect to mitigating evidence. *Mills v. Maryland*, 486 U.S. 267 (1988). Refusal to permit counsel to inquire of the jurors regarding parole also creates an impermissible risk that jurors will be seated who will impose a sentence based on extrinsic and erroneous information. Instruction or argument in this regard is not sufficient. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Morgan v. Illinois*, 504 U.S. 719 (1992). A juror might sit

* * *

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* June, 1998.

Benjamin Lee Lilly, Appellant,

against Record Nos. 972385 and 972386
Circuit Court No. 13636

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 17th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ Illegible
Clerk

UNITED STATES SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 9, 1998

Clerk
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219

Re: Benjamin Lee Lilly
v. Virginia
No. 98-5881
(Your No. 972385, 972386)

Dear Clerk:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

William K. Suter, Clerk

Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF FOR PETITIONER

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6188

QUESTIONS PRESENTED

(CAPITAL CASE)

I. Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against penal interest of an unavailable witness when the alleged accomplice refused to testify under the Fifth Amendment, violates the Sixth and Fourteenth Amendments?

II. Whether there is a firmly rooted exception to the hearsay rule which would permit the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, without violating the Sixth and Fourteenth Amendments?

III. Whether, in assessing the reliability of the hearsay statements of an unavailable declarant, contained in a custodial confession and offered as a declaration against penal interest, the Sixth and Fourteenth Amendments prescribe that only the circumstances surrounding the making of the statements are relevant and prohibit consideration of other corroborating evidence introduced at trial, and if so, whether a custodial confession which inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, bears the requisite particularized guarantees of trustworthiness for their admission as evidence against Petitioner under the Sixth and Fourteenth Amendments?

PARTIES

All of the parties to the proceedings below are listed in the caption of the case, *supra*. *See* Sup. Ct. R. 24.1(b).

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BRIEF FOR PETITIONER

Benjamin Lee Lilly (hereafter "Petitioner" or "Ben Lilly") respectfully requests that the judgment of the Supreme Court of Virginia affirming his conviction and sentence of death be reversed and this matter remanded for a new trial.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is officially reported at 255 Va. 558, 499 S.E.2d 522 (1998). JA 576. The rulings of the Circuit Court of Montgomery County (the trial court), which the Supreme Court of Virginia affirmed, were not reported. JA 17-18.

JURISDICTION

This petition seeks review of the final judgment of the Virginia Supreme Court in this matter, entered April 17, 1998, as to which a motion for rehearing was denied on June 5, 1998. JA 614. A Petition for a Writ of Certiorari was timely filed on September 2, 1998, and this Court granted a writ of certiorari on November 9, 1998. JA 616. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution (the "Constitution") are reprinted in full in an appendix to this brief.

SUMMARY OF THE ARGUMENT

I. The admission of Mark Lilly's custodial hearsay statements incriminating Petitioner violated Petitioner's right to confrontation under the Sixth and Fourteenth Amendments. The Sixth Amendment was designed to prevent convictions based on, among other things, the admission of a non-testifying accomplice's uncross-examined testimony. Because in such circumstances the accomplice remains unknown to the jury and unchallengeable by the accused, admission of his

confession undermines the fundamental values promoted by confrontation: fairness and reliability. Under this Court's Sixth Amendment jurisprudence, the government must first demonstrate the hearsay declarant's unavailability, and then establish that the proffered hearsay bears adequate indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990). Reliability may be inferred where the evidence falls within a firmly rooted hearsay exception. *Id.* If the evidence does not fall within such an exception, it must be excluded unless it bears particularized guarantees of trustworthiness. *Id.* The Commonwealth in this case fell far short of meeting its burden in numerous respects.

IA. This Court has consistently held that the custodial confession of a non-testifying and unavailable accomplice implicating a criminal defendant is presumptively unreliable "due to his strong motivation to implicate the defendant and to exonerate himself." *See, e.g., Lee v. Illinois*, 476 U.S. 530, 541 (1986). In fact, this Court has never found that presumption rebutted and has never permitted the admission of such a confession at a defendant's trial. *See id.* Following this fundamental principle that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another," *id.* at 545, this Court, the federal appeals courts and state courts of last resort consistently have concluded that such statements are presumptively unreliable and inadmissible under the Confrontation Clause, especially when the statements minimize the declarant's role in the criminal activity and shift blame onto others.

IB. The custodial statements of a non-testifying accomplice inculpating a criminal defendant do not fall within a firmly rooted hearsay exception. Without formally deciding whether the general category of statements against penal interest falls within a firmly rooted hearsay exception, this Court has concluded that it is too large a class for meaningful Confrontation Clause analysis. *See Lee*, 476 U.S. at 544 n.5. Accordingly, whether or not statements against penal interest

constitute a firmly rooted hearsay exception, as the overwhelming majority of lower courts have concluded, the custodial confession of a non-testifying accomplice incriminating a defendant does not fall within a firmly rooted hearsay exception.

IC1. This Court has made clear that in assessing the reliability of hearsay statements of an unavailable declarant which do not fall within a firmly rooted hearsay exception, only the circumstances surrounding the making of the statement are to be considered. *Wright*, 497 U.S. at 822. This Court's holding in *Wright*, which involved a child victim's statements of abuse offered under a state's residual hearsay exception, applies equally in the context of declarations against interest. Here, as in *Wright*, admission of presumptively unreliable evidence must not be permitted by bootstrapping on the trustworthiness of other evidence at trial. *See id.* at 823. Indeed, in the circumstances presented here – a custodial confession of an accomplice which shifts blame to the defendant – there can be no such showing of trustworthiness.

IC2. The circumstances surrounding the making of Mark Lilly's custodial confessions incriminating Petitioner belie any guarantees of trustworthiness. Mark Lilly's statements were made following his arrest, while he was in custody and in response to police questioning after he was told that the court would be informed of his cooperation. Those circumstances provided Mark Lilly a strong incentive to shift or spread blame, curry favor, or divert attention to another. Moreover, throughout the statements, Mark Lilly consistently relied on his drunkenness as a mitigating circumstance and minimized his role in the robberies and the murder and shifted blame to others. As this Court and every federal appeals court and state court of last resort (other than the Virginia Supreme Court) confronting statements made under similar circumstances has concluded, Mark Lilly's statements incriminating Petitioner were made under circumstances that render them inherently and inevitably suspect and hence inadmissible under the Confrontation Clause.

STATEMENT OF THE CASE

On December 5, 1995, Alexander V. DeFilippis ("DeFilippis") was abducted and subsequently murdered. This occurred after three individuals – Gary Wayne Barker ("Barker"), Petitioner and his brother Mark Lilly – had been on a twenty-four-hour binge; all three had drunk heavily and Mark Lilly and Barker had smoked marijuana as well. JA 102, 107-09, 114, 173, 181-82, 205, 246-47, 299-301. On December 4, 1995, the three men broke into the home of a friend of Barker and Mark Lilly, stole three weapons – a rifle, a shotgun and a pistol – a safe and a quantity of liquor. JA 102-05, 248-51, 301-03. The three then visited a friend, Warren Nolen, and his girlfriend, Patricia Quesenberry. JA 106-07, 171-72, 213; Tr. Oct. 21, 1996, at 162-70, 175-179; Tr. Oct. 23, 1996, at 898-906. The three drank from the liquor they had stolen, and Barker and Mark Lilly smoked marijuana. JA 107, 181-82. Mark Lilly and Barker also attempted to sell the stolen firearms to purchase more marijuana. JA 107. Concerned by Mark Lilly's and Barker's behavior, particularly a statement by Barker that he would shoot the police if they attempted to arrest him, Nolen and Quesenberry asked them to leave. JA 343-44, 345. The three then drove to A.J. Fall's trailer, where Barker and Mark Lilly rented a room, JA 173, 333, 341, and continued to drink "all night." JA 108-09, 173, 299, 304.

The next day, December 5, 1995, the three men left the trailer, drinking and driving around the countryside. JA 109-10. That afternoon, Barker and Mark Lilly visited Mike Lang to see if he would join them, but his mother, Joyce Lang, refused to allow him to do so after Barker said that he could kill his best friend and not feel any remorse. JA 342; Tr. Oct. 24, 1996, at 917-19, 931, 1019-20. Petitioner, Mark Lilly and Barker later stopped to fire the stolen firearms at some geese – Barker firing the rifle and Mark Lilly and Petitioner shooting the pistol – and killed a goose which they put into the trunk of the car they were driving. JA 110-12. They then drove back to the trailer park, where Mark Lilly and Barker unsuccessfully attempted to trade the pistol for marijuana. JA

113-14, 174, 204-05. Thereafter, they drove to a bar, where Mark Lilly attempted to sell the pistol to Ron Lucas, a co-worker he had run into, and Barker attempted to sell the rifle. JA 114-15, 176-77; Tr. Oct. 21, 1996, at 189-92. On seeing that Barker had the weapons out, Petitioner told him to put them away. JA 55.

In the early evening of December 5, 1995, the car the three had been using broke down near a convenience store. JA 117-18, 252-53, 304. DeFilippis happened to be standing outside his car near the store. JA 120. At approximately seven o'clock, DeFilippis was ordered into the car and driven to a secluded area. Tr. Oct. 21, 1996, at 84; JA 121-23, 253-54, 304-10. DeFilippis was told to leave the car and strip down, and then shot with the pistol and killed. JA 123-29, 252-62, 309-15. Following the shooting, at approximately seven-thirty, Barker, Mark Lilly and Petitioner robbed a convenience store. JA 133-37, 262-66, 317-19; Tr. Oct. 21, 1996, at 222. They attempted to rob a second convenience store about forty-five minutes later. JA 139-42, 266-70. At the first store, Barker brandished the pistol used to kill DeFilippis and threatened Howard Barnett, the store owner, by pointing the pistol at him and ordering him to lie down and not to look at Barker's face. JA 341-42, 345-46. At the second store, Barker threatened Bill Williams, the store owner, by putting the pistol to his head, with the hammer cocked back, and saying, "I'll blow your head off." JA 350-51, 353-54.

Driving away from the second store, their car broke down, and police arrived on the scene shortly thereafter. JA 140-42, 270; Tr. Oct. 21, 1996, at 225, 264. Petitioner did not flee, but remained in the car. Mark Lilly and Barker fled on seeing the police approaching. JA 142-43, 270-71. The police arrested Petitioner on the spot, but held him at the scene for approximately two hours. *See* Tr. Oct. 21, 1996, at 240-41, 268; Tr. Sept. 25, 1996, at 159-61. They arrested Barker, who had fallen in a ditch some fifty feet away from the car, Tr. Oct. 22, 1996, at 435-37, approximately ten to thirty minutes after Petitioner was arrested and immediately transported Barker to the police station. Tr. Oct. 21, 1996, at 240-41. The police later arrested Mark Lilly and transported him to the

station. Tr. Oct. 22, 1996, at 446-48. The police first interrogated Barker beginning at 9:47 on the evening of December 5, 1995. JA 278; Tr. Oct. 23, 1996, at 808-09. Having obtained a statement from Barker, the police then interrogated Mark Lilly at 1:35 the morning of December 6, 1995. JA 244. The officer conducting the interrogation informed Mark Lilly *before* it officially began that Barker and Petitioner had said he did not commit the murder. JA 257.[1] The police interrogated Mark Lilly again at 2:30 a.m., JA 298, and finally questioned Petitioner at 3:55 a.m. JA 63.

Petitioner faced charges in Montgomery County for the abduction and robbery of DeFilippis; carjacking; and murder as part of the commission of the armed robbery of DeFilippis, which constitutes capital murder, Va. Code § 18.2-31(4); as well as the unlawful possession of a firearm and the use of a firearm in the foregoing offenses. JA 20-28. By the time of trial, Barker had received a plea bargain on essentially the same charges Petitioner faced – with the crucial difference that Barker was charged with and pled guilty to being a principal in the second degree to capital murder (*i.e.*, aiding and abetting), JA 412, which made him ineligible for the

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[1] As the officer himself stated, "I simply told you *before we started* that they said you didn't do it." JA 257 (emphasis added). Although the officer told Mark Lilly "they" said he did not do it, his testimony at trial makes clear that only Barker had been questioned by this point and that the officer would have told Mark Lilly that he had spoken with Barker. JA 278. What else the officer told Mark Lilly before the interrogation officially began is unknown; however, during the interrogation, either out of a sense of paranoia or possibly based on what he had been told by the officer, Mark Lilly responded to a question about what had happened, stating, "Nothing that you don't already know, man." JA 256. Therefore, it is clear that the transcript does not include the discussion between the officer and Mark Lilly that immediately preceded the interrogation and may have induced him to agree to an interrogation – something which he had initially refused to do. *See* JA 245 ("Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions. . . . And you initially said that you felt like you were still under the influence. . . . [Y]ou tell me now that. . . . you don't feel too drunk to talk to me.").

death penalty[2] – and had received the minimum sentence, fifty-three years, which gave him what the Commonwealth had promised, "[a] chance of maybe one day of getting out." JA 99. Mark Lilly also faced prosecution for essentially the same crimes as Petitioner, with the exception that Mark Lilly was accused of first-degree, and *not capital*, murder. Mark Lilly had not been brought to trial at the time of Petitioner's trial. As a result, the prosecution had "the option of charging Mark Lilly as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame."[3] His charges still outstanding, Mark Lilly refused to testify at Petitioner's trial, invoking his Fifth Amendment rights. JA 238. After Petitioner's trial, Mark Lilly pled guilty to first-degree murder and received a sentence of forty-nine years.

Petitioner's five-day trial began on October 21, 1996. In his opening argument, the prosecutor predicted that the case would come down to whether Ben Lilly or Barker was lying; he failed to mention Mark Lilly, let alone ascribe to him any role in the trial. Tr. Oct. 21, 1996, at 1476. Despite that singular reliance in opening, the Commonwealth's principal evidence consisted of the testimony of Barker ***and*** custodial statements by Mark Lilly, all of which were critical to the Commonwealth's case. After Barker testified and was cross-examined, the prosecutor sought to admit all of Mark Lilly's custodial statements. The trial court admitted these statements over Petitioner's objection based on his Sixth Amendment right to confrontation. JA 7-8, 225-36.

Mark Lilly's statements principally were self-exculpatory. Although he minimally and peripherally inculpated himself in lesser crimes, his statements placed the blame for the capital crime on Petitioner and responsibility for the remaining crimes on Petitioner and Barker. Absent Mark Lilly's custodial statements, which were materially inconsistent with other evidence introduced at trial, there was scant credible

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[2] *See Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986).

[3] Lisa K. Garcia, *Slaying Suspect's Trial Starts Today*, The Roanoke Times, Oct. 15, 1996, at A2 (submitted by Petitioner during voir dire).

evidence of capital murder against Petitioner. There was no physical evidence linking Petitioner to the murder: he was not found in possession of the murder weapon, nor were his fingerprints found on it, nor was there any other physical evidence linking him to the murder. And as to Barker's testimony "fingering" Petitioner, other witnesses contradicted Barker's self-serving testimony in numerous respects.

The Commonwealth recognized by the close of trial that a successful prosecution depended on both Barker's testimony and Mark Lilly's custodial statements. The prosecutor expressly acknowledged in his closing argument that Barker was "key" to the case against Petitioner only "to a certain extent." JA 360. Indeed, Mark Lilly's uncross-examined statements were well-equipped to overcome the material failings in Barker's self-serving testimony. To cement Barker's testimony – which centered squarely on events at which only Petitioner, Barker and Mark Lilly were present, *see* JA 393 – the prosecutor repeatedly availed himself of Mark Lilly's statements to police, and used the combination of Barker and Mark Lilly to make the case against Petitioner. The prosecutor argued that both Barker and Mark Lilly admitted seeing DeFilippis, JA 362; that both Barker and Mark Lilly identified Petitioner as being responsible for his death, JA 363, underscoring in the process that Mark Lilly is Petitioner's brother, JA 363-64; that both Barker and Mark Lilly were upset by the shooting, JA 364; and that both Barker and Mark Lilly admitted firing weapons on the day of the murder. JA 396. Anticipating the defense's closing argument, moreover, the prosecutor made clear the integral role of Mark Lilly's statements: "I submit to you that there is plenty of evidence for you to [convict], and they're going to tell you you can't believe the other *two*." JA 364 (emphasis added). Finally, echoing the theme that the *two* could not be disbelieved in favor of the *one*, the prosecutor emphasized to the jury on rebuttal that it could not find that both Barker and Mark Lilly were liars and that Petitioner was innocent. JA 389-90.

On October 25, 1996, the jury, focused on the weakness of the direct evidence, requested clarification on the meaning

of circumstantial evidence, JA 401, but ultimately found Petitioner guilty on all charges. At a separate sentencing proceeding on October 28, 1996, the jury sentenced Petitioner to death for the capital murder, plus two life sentences and twenty-seven years imprisonment for the other charges. Following a post-sentencing hearing on February 11, 1997, at which Mark Lilly recanted the portions of his confession identifying Petitioner as the trigger man, JA 397-98, the trial court entered an order on March 7, 1997, sentencing Petitioner in accordance with the jury's verdicts.

The Barker Testimony

Beginning on October 22, 1996, and over the course of the last two days of the Commonwealth's case, Barker described the events leading up to the shooting of DeFilippis and the robberies thereafter. First, Barker described the robbery of a residence the night of December 4, 1995. He then stated that when their car broke down late the next day, Petitioner confronted DeFilippis, ordered him into the car at gunpoint, robbed him of his wallet, called Barker and Mark Lilly over to the car, drove to a secluded area and shot DeFilippis with the pistol. Barker, who testified that he found it "funny" that DeFilippis was asked to remove his clothes before he was killed, JA 127-28, 181, attempted to portray Petitioner as a cold-blooded and merciless killer. JA 128-30. Barker claimed that Petitioner said he shot DeFilippis because DeFilippis had seen his face and he did not want to return to prison. JA 129-30. Barker feebly attempted to disavow the existence of any such motive on his own part. He claimed that while he was concerned about later being identified by DeFilippis, he had managed to hide his face from DeFilippis every step along the way to the murder – as he walked up to the car when it was being hijacked, when he rode in the car with DeFilippis, and when he exited the car at the scene of the murder – but conceded on cross-examination that he could not be certain that DeFilippis had not seen his face. JA 122-23, 183-85, 208.

Barker then described the robberies of the two convenience stores following the murder, admitting that he brandished the murder weapon during both robberies, JA 129, 135-36, 139-40, 189, and that while fleeing the scene of the second robbery, he fired the rifle out the window of the car to frighten off the driver of the car in pursuit. JA 141-42. He emphatically denied threatening anyone during either robbery, however, and specifically denied ordering a victim to lie on the ground and not to look at his face. JA 177-78, 183, 188-90. Finally, he testified that he was arrested as he sat in a ditch with a rifle in his mouth and called out for the police to tell his mother that he loved her, wanting to kill himself "[f]rom what I seen and, and, and, and for what I did." JA 144-45, 194.

The Impeachment Of Barker's Testimony

Barker's testimony was contradicted by other witnesses, particularly with respect to statements he made evidencing his willingness to kill if necessary, as well as threats he made, while wielding the murder weapon, to victims during the convenience-store robberies.[4] Barker's testimony was also impeached as to Petitioner's behavior the night before the murder. Witnesses contradicted Barker's testimony that Petitioner handled firearms during two visits that night and Barker's denial that Petitioner ordered Barker, who was drinking and had brought the weapons out in public, to put them away.

First, Barker testified that Ben Lilly shot DeFilippis at point-blank range. JA 195. On the contrary, Dr. David Oxley, a forensic pathologist and deputy chief medical examiner for Western Virginia, testified that the victim's wounds revealed no gunshot residue, which would indicate shots fired from more than two feet away. JA 91.

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[4] Witnesses also testified regarding Barker's reputation for being untruthful. JA 356-57; *see* JA 332.

Second, although Barker admitted having failed to tell the police that they visited Warren Nolen and Patricia Quesenberry on December 4, 1995, he denied telling Nolen and Quesenberry that if the police attempted to pull his car over, he would shoot them. JA 171-72. On the contrary, Ms. Quesenberry testified that because she knew Mark Lilly and Barker "were out doing things that they shouldn't be doing," she asked, "what would they do if the law would get after them," and Barker, jumping off the couch, said, "I'll take a gun and blow out the back window and then I'd shoot anyone that would try to take [me]." JA 343-44. Mr. Nolen confirmed that Barker made a "comment about if they got stopped or anything he would shoot the back glass out, shoot a cop or anybody." JA 345.

Third, Barker denied that later on December 4, 1995, he pointed a gun at or threatened A.J. Fall, who rented a room to Mark Lilly and Barker, and denied that Mark Lilly had pulled the hammer back on the pistol or pulled it out to threaten anyone. JA 173-75. Mr. Fall testified, however, that Barker pointed a rifle at him, JA 335-36, and that later, when words were exchanged with a neighbor, Mark Lilly pulled the hammer back on the pistol he was carrying inside his sweater jacket, exposed the gun and gave the impression that he was going to pull it out. JA 337-40.

Fourth, while Barker claimed to be "positive" that Petitioner handled a weapon during the visits with Mr. Nolen, Ms. Quesenberry and Mr. Fall, JA 172, 174, Ms. Quesenberry and Mr. Fall testified that Petitioner did not handle any of the weapons. JA 329, 334-35.

Fifth, Barker denied having seen Joyce and Michael Lang on the day of the murder and denied telling them that he could kill his best friend and not regret it. JA 176. On the contrary, Mrs. Lang testified that Barker was at her house and had said "[t]hat he could kill his best friend without regretting it," and that she had therefore not wanted her son to go out with Mark Lilly and Barker. JA 342.

Sixth, when asked whether at a bar that same night, he pulled out a gun and Ben Lilly told him to put the guns away, Barker testified, "Definitely not." JA 177. To the contrary,

Ron Lucas testified that when Barker showed him a rifle at the bar, Petitioner told Barker to "put the . . . God damn guns away." JA 55.

Seventh, Barker denied having pointed a gun at Howard Barnett, one of the owners of the first store that was robbed, and further denied telling Mr. Barnett not to look at his face. JA 183, 188. Mr. Barnett and Mrs. Barnett, who was also in the store when the robbery occurred, both testified that Barker pointed a gun at Mr. Barnett, JA 341-42, 346, and Mr. Barnett testified that Barker ordered him to lie down and not to look at Barker's face. JA 341.

Finally, Barker denied saying to Bill Williams, who attempted to prevent the second convenience-store robbery, that he would blow Mr. Williams' head off, and denied pointing a gun at his forehead. JA 177-78. Mr. Williams testified, however, that Barker, after struggling with him and while holding a gun to his head, said, "I'll blow your head off," and Mr. Williams then directed the clerk to hand over "the damn money." JA 350-51. Mona Hylton, the clerk on duty at the time of the robbery, also testified that Barker pointed the gun at Williams' head, adding that Barker had pulled the hammer back on the gun. JA 353-54.

Barker's testimony was a constructed effort to avoid the death penalty and perhaps one day leave prison alive. His testimony was self-serving and he lied about his violent statements the night before the murder and his life-threatening criminal behavior immediately following the murder.

The Mark Lilly Statements

On October 23, 1996, just before resting its case, the Commonwealth introduced Mark Lilly's custodial statements to police to cement Barker's self-serving testimony against Petitioner. In his recorded statements to police, Mark Lilly repeatedly offered claims of mitigating circumstances and consistently shifted primary responsibility for the crimes to Barker and Petitioner. After the officer conducting the first interrogation explained that by speaking with him Mark Lilly could "at least offer the court the fact that you did own up to

it and was willing to take responsibility for what occurred," JA 247,[5] Mark Lilly explained that he, Ben Lilly and Barker had started drinking the day before, JA 247, 299-300, and had "partied all night," JA 299, that he had awoken drunk that morning and that he had been drinking liquor – "Vodka, Evan Williams, Jim Beam, a little bit of everything" – all that day. JA 248. Throughout his statements, Mark Lilly relied on his drunkenness as an excuse for his lack of memory as well as for his actions.[6]

Having thus attempted to establish his drunkenness as an excuse, Mark Lilly then proceeded to minimize his role in every aspect of the alleged crimes and consistently shift blame onto Barker and Petitioner, going so far in his attempt to distance himself from Petitioner and Barker as to claim that it was Petitioner and Barker who were friends when, in fact, it

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[5] When Mark Lilly later became concerned that he would be incarcerated for "armed robbery" and "some kind of murder charge," the officers explained, "That's why we're talking to you, we're trying to help you right now. . . . " JA 307. *See* JA 311 ("We're trying to help you. . . . ").

[6] *See* JA 248 ("What time did ya'll leave that residence this morning? I have no idea. . . . Besides, I've been drunk all day, I was drunk when I got up."); JA 249 ("So you went to a residence, you got the liquor out, and what else did you get? I don't, I don't really know, you know, everything that was got out cause I was drunk."); JA 254 ("So did all of ya'll load into the car then? I had to or get left man, I was so drunk."); JA 255 ("Anything that you remember about him? What he was wearing or anything that stood out? I don't really remember man, I was so drunk."); JA 264 ("You didn't pay for it, you just took it? Right, I was so drunk, I don't do that shit, you know, if I'm sober."); JA 267-68 ("Did ya'll discuss it before you went in, say 'Ben you stay here and we're gonna go in and rob this' or what was the discussion? We was all so drunk."); JA 299 ("If you would, let's talk about how did yesterday start off? I was drunk. . . . I was drunk. . . . Drunk as I ever been."); JA 303 ("Anything else you can think of? Not that I can think of. I was so drunk. I was drunk when you brought me in here at 1:30 this morning."); JA 304 ("What do you remember next? . . . Drunk as shit. That's all I remember."); JA 306 ("Ben told y[']all to come on? Yeah, we was drunk man."); JA 308 ("What did they, where were the rifle and shotgun at that time? I don't even know. I wasn't worried about no gun. I was drunk, the only thing I keep up with man is the beer.").

was *Mark Lilly* and Barker who were friends and roommates. JA 100, 333, 341. Indeed, if Mark Lilly's statements to police are credited, he drank significant amounts of alcohol the day before and the day of the murder and was merely present when the various crimes he described occurred; Petitioner was responsible for the carjacking, robbery and shooting of DeFilippis;[7] and Petitioner and Barker were to be blamed for the convenience store robberies following the murder. Mark Lilly's story was as follows:

First, Mark Lilly addressed the theft from the friend's residence the night before the murder, saying initially that Petitioner – "Lilly, just Ben" – stole liquor from the residence. JA 249. While he later admitted that they were "all on it," he only admitted stealing liquor, but stated that Petitioner and Barker stole "some guns or something." JA 249-50.

Second, Mark Lilly identified Petitioner as the one who pulled a gun during the carjacking, JA 253, 304-05, placing himself passively in the disabled car while the other vehicle was being carjacked. JA 305-06. When asked if he had ridden away in the carjacked vehicle, he explained that he "had to [get in the car] or get left man." JA 254. He further denied having a gun while riding in the hijacked car. JA 255.

Third, Mark Lilly stated that he had "nothing to do with the shooting," going so far as to deny even having left the car when DeFilippis was shot. JA 256, 258-59, 312-13, 319. He explained that he thought Petitioner was going to leave DeFilippis outside the car and just take the car. JA 259.

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[7] When Mark Lilly expressed a reluctance to incriminate his brother, the officer counseled:

> [N]ormally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. *Especially if he done it without . . . consent of everybody. If ya'll had all said, "Yeah, let's all kill him" or something. I think you need to share in it.* But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

JA 257 (emphasis added).

Fourth, when asked about the robberies generally, Mark Lilly stated he did not know whose idea it was, "the robber[ies] just happened like that." JA 317-18. He later said, however, "[I]t just all happened quick. *They* was drunker than hell." JA 318 (emphasis added). When asked whether he had received any money from the robberies, he added, "A few dollars. Both of them mother-fuckers are crazy. . . . Ben and Gary. Already had enough charges on them as it was." JA 319.

Fifth, with respect to the robbery of the first convenience store, Mark Lilly said simply that "*they* wanted to rob it." JA 263 (emphasis added). He added that either Petitioner or Barker was armed, but denied carrying a weapon himself, and identified Petitioner as the one who stole the money from the store. JA 263, 265-66. In virtually his only direct inculpatory admission, Mark Lilly confessed that he stole a twelve-pack of beer from that store; however, he quickly explained that he did so only because he was drunk. JA 264.

Finally, with respect to the robbery of the second convenience store, Mark Lilly identified Barker as being armed, but denied carrying a weapon and denied they stopped to rob the store, claiming that "[w]e stopped there for something, I don't know." JA 267. He explained that Barker confronted the clerk, brandishing a gun and announcing that this was a robbery. JA 268. When asked about shots fired from the car as they made their escape, he said he did not know who fired out the window, but denied that he had done so. JA 269-70.

Accordingly, in his statements to police, Mark Lilly only halfheartedly accepted responsibility for stealing beer. However, he never admitted making even a single decision with respect to any of the crimes, other than deciding to get in the victim's car once it had been hijacked so as not to be left behind. He never admitted carrying a weapon, and never admitted even speaking to the victim. Instead, he placed virtually all responsibility for the crimes on Barker and Petitioner. Thus, virtually none of the statements were truly against Mark Lilly's penal interest. His version of events was

also contradicted in material respects by the physical evidence and the testimony of disinterested witnesses and Barker.

The Contradictions Between Mark Lilly's Statements And The Testimony Of Disinterested Witnesses And The Physical Evidence

The testimony of disinterested witnesses and the physical evidence contradicted Mark Lilly's statements to police on several points. First, Mark Lilly misrepresented his relationship with Barker, describing Barker as his "brother's buddy." JA 248. Mr. Fall testified, however, that Mark Lilly and Barker were renting a room together in his mobile home. JA 333, 340-41. (Indeed, Barker himself testified that he had known Mark Lilly, who was living with him, JA 100, for "a long time" but had only known Petitioner for "[a] month or so." JA 98.)

Second, Mark Lilly told police he was unaware of the location of the house that they broke into the night before the murder and did not know whose house it was. JA 248-49, 279-80, 301. To the contrary, Danny Sanders, who owned the house, testified that Mark Lilly and Barker not only knew where he lived, having been there on several occasions, but also knew he would be out of town the night of the break-in. JA 55-56.

Third, regarding his role in the convenience-store robberies, Mark Lilly stated only that he "was with the people who did [the robberies]." JA 317. He specifically denied taking any money from the stores himself. JA 264-66, 268. Louise Barnett, owner of the first store that was robbed, testified, however, that Mark Lilly was one of the parties who gathered up whatever they wanted from the store. Tr. Oct. 24, 1996, at 1070. Bill Williams, owner of the second store that was robbed, testified that while Gary Barker held a gun on him, Mark Lilly took the money out of the cash register. JA 351. Mona Hylton, the clerk at the second store, also testified that it was Mark Lilly who grabbed the money as he ran out of the store. JA 354.

Fourth, Mark Lilly said the clerk at the second convenience store was laughing at one point during the robbery, JA 268, but both Mr. Williams and Ms. Hylton denied that Ms. Hylton had laughed. JA 352, 355.

Fifth, while Mark Lilly claimed that he did not leave the car at the murder scene, JA 258-59, 312, police found a money clip stolen from Danny Sanders' home the night before the murder and seen in Mark Lilly's possession that same night, JA 54, 329-31, at the scene of the murder. JA 84-85, 86.

Finally, Mark Lilly stated that he was "broke" before the convenience store robberies, JA 318, and that after the three divided the money from the robberies, he had under a hundred dollars in his possession. JA 264-65. The police inventory of items in his possession noted, however, that he had one hundred and twenty-nine dollars in his possession, Tr. Oct. 22, 1996, at 480 – a sum which supports his later recantation in which he admitted robbing DeFilippis of twenty-one dollars. JA 397. (The police inventory showed that Petitioner had ninety-five dollars and Barker had ninety-seven dollars in cash in their possession. Tr. Oct. 22, 1996, at 479, 481.)

The Contradictions Between Barker And Mark Lilly

Mark Lilly's statements to police were contradicted by Barker on several points, particularly with respect to Mark Lilly's own culpability, how the murder allegedly occurred and what Petitioner allegedly said following the murder.

First, Mark Lilly *initially* told police that when their car broke down "*we* went across the parking lot and dude [Petitioner] pulled a gun on this other dude [DeFilippis] and told him we was taking his car and he was going with us," JA 253 (emphasis added), but *later* placed himself in their own car during the carjacking. JA 304-05. Barker, however, testified that he and Mark Lilly were walking towards the woods with the guns and liquor to "stash them in the woods . . . or to steal us a car and get out of there." JA 118-20.

Second, Mark Lilly told police that "nobody talked" following the hijacking, including the victim, JA 309-10,

while Barker testified that the victim told them that he would have been willing to give them a ride and take them wherever they wanted. JA 123.

Third, Mark Lilly said that he was in the car when the shooting occurred, and that only Petitioner and DeFilippis had gotten out of the car, JA 258-59, 312, but Barker testified that all four had gotten out. JA 123-25. Barker added that as he and Mark Lilly exited the car, they first told DeFilippis to close his eyes and then they got out of the car while DeFilippis had his eyes closed. JA 123. Mark Lilly, insisting that he did not exit the car, never mentioned this.

Fourth, while Mark Lilly denied having a weapon in the car, JA 255, Barker testified that in the car with DeFilippis, *Mark Lilly was carrying the pistol*, the murder weapon, in his pants. JA 124.

Fifth, Barker testified that *Mark Lilly* ordered DeFilippis to start walking away from the car, and that Petitioner asked Mark Lilly for the pistol which Mark Lilly was carrying before shooting DeFilippis, JA 127, 129, events which Mark Lilly completely omits.

Sixth, Mark Lilly stated that Petitioner shot DeFilippis from about "ten to fifteen yards" away, JA 259-60, whereas Barker testified that Lilly shot him at point-blank range. JA 195.

Seventh, Mark Lilly stated *initially* that nothing was said when Petitioner returned to the car after the shooting, JA 260-61, 316-17 but *later* asserted only that he and Barker said, "Goddamn. Motherfucker shot him," and affirmed the officer's suggestion that Petitioner responded, "I shot the dude and I think he's dead." JA 319-20. Barker testified, however, that he and Mark Lilly asked Petitioner why he had done it and that Petitioner had responded that DeFilippis had seen his face and he did not want to return to the penitentiary. JA 129-30.

Eighth, while Mark Lilly said Barker and Petitioner wanted to rob the first convenience store, JA 263, Barker testified that they had *all* agreed to rob the store to obtain money and leave town. JA 134.

Finally, while Mark Lilly said that Petitioner stole the money from the first convenience store, JA 266, Barker testified that it was *Mark Lilly* who rifled through the cash register. JA 136.

The material inconsistencies between Barker's testimony and Mark Lilly's statements to police underscore the extent to which Mark Lilly sought to minimize his own culpability and further undercut the reliability of Mark Lilly's statements.

Mark Lilly's Recantation

At Petitioner's post-sentencing hearing, Mark Lilly recanted his statements to police, testifying that he had lied to the authorities. Specifically, he testified that he had robbed DeFilippis, and that he was vomiting near the other side of the car during the murder and therefore could not say who committed the murder. JA 397-98, 399. He explained that when "[t]he investigator started talking all these life sentences . . . I could get . . . I got scared . . . [and] [threw] it off on somebody else." JA 397. He further explained that he blamed the murder on Ben Lilly, and not Barker, because he feared what Barker – his roommate – might say about him: "Well, me and Gary, we, we've been, we've been in a whole lot of trouble together and Gary knows a whole a lot on me. . . ." JA 400.

ARGUMENT

Admission Of Mark Lilly's Post-Arrest Statements Violated Petitioner's Sixth Amendment Right To Confrontation Because A Post-Arrest Statement, Made By A Non-Testifying Accomplice In The Course Of Custodial Interrogation, Which Shifts Blame To The Defendant And Incriminates The Defendant In Significantly More Serious Criminal Conduct, Is Inherently Unreliable And Therefore Inadmissible.

Petitioner's conviction rests squarely on the uncross-examined hearsay statements of Mark Lilly. The admission of such statements of a non-testifying accomplice, without the

opportunity for confrontation and cross-examination, strikes at the core of the Confrontation Clause, and permits the precise evil the Clause was intended to cure: convictions based on the testimony of unknown and unchallengeable witnesses against the accused. The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. amend. VI. As this Court has observed, " '[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (citation omitted).

The right to confront and cross-examine adverse witnesses "contribut[es] to the establishment of a system of criminal justice in which the perception . . . of fairness prevails," and "ensur[es] that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee*, 476 U.S. at 540. Indeed, as this Court has concluded:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, *confessions of accomplices*, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face. . . . "

California v. Green, 399 U.S. 149, 156-57 (1970) (citation omitted) (emphasis added). By eliminating this abusive practice, the right to confront and to cross-examine witnesses also "promotes reliability in criminal trials." *Lee*, 476 U.S. at 540.

As this Court has counseled, confrontation and cross-examination advance the pursuit of truth by

> (1) insur[ing] that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forc[ing] the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

Id. (quoting *California v. Green*, 399 U.S. at 158); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

Neither the perception of fairness nor the reliability of criminal trials is promoted when a blame-shifting custodial confession of a non-testifying accomplice is admitted against a defendant: that "witness," whose motivation to inculpate the defendant is inevitably suspect, is not subject to oath and cross-examination; as a result, he is wholly unknown to the jury and his testimony is unchallengeable by the defendant. For these reasons, admission of a non-testifying accomplice's blame-shifting custodial confession as substantive evidence against a criminal defendant implicates the core protection of the Confrontation Clause.

Mark Lilly's statements to police fall far short of meeting this Court's requirements under the Confrontation Clause for admission of hearsay statements which incriminate a criminal defendant. In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court established "a general approach" for determining when statements incriminating a defendant and falling within an exception to the hearsay rule are admissible under the Confrontation Clause, an approach this Court reiterated more recently in *Idaho v. Wright*:

> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' *Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.*"

497 U.S. 805, 814-15 (1990) (quoting *Roberts*, 448 U.S. at 65-66) (emphasis added).

Under that general approach, admission of Mark Lilly's statements violated the Confrontation Clause. First, although Mark Lilly was technically unavailable at trial because of his assertions of his Fifth Amendment rights, the timing of his trial was within the Commonwealth's control. If it had wanted Mark Lilly's trial testimony, it would have sought to try him before Petitioner or resolved his charges, as it did with Barker. Instead, the Commonwealth wanted to have its cake and eat it too: to use Mark Lilly's statements at Petitioner's trial, without exposing Mark Lilly to confrontation and cross-examination, and to preserve the option of trying him for capital murder.

Moreover, Mark Lilly's statements to police incriminating Petitioner lack any indicia of reliability. Those statements

are patently unreliable: they were not self-inculpatory of Mark Lilly; they were made in a context and under circumstances that belie any guarantees of trustworthiness, and cry out for adversarial testing to establish their reliability. Mark Lilly's statements neither fall within a firmly rooted hearsay exception nor possess particularized guarantees of trustworthiness. Accordingly, their admission into evidence violated Petitioner's constitutional right to confrontation under the Sixth Amendment.

A. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Presumptively Unreliable And Inadmissible.

Under well-established caselaw, uncross-examined hearsay statements like Mark Lilly's, which are part of a custodial confession by an accomplice that incriminates a defendant, are presumptively unreliable and inadmissible under Confrontation Clause analysis. This Court has repeatedly

> recognize[d] that th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . [S]uch a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are *less credible than ordinary hearsay evidence.*"

Lee, 476 U.S. at 541 (citation omitted) (emphasis added); *see Williamson v. United States*, 512 U.S. 594, 601 (1994); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) ("confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest"); *Bruton*

v. United States, 391 U.S. 123, 136 (1968); *see also Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring in part and in the judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result) (stating that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption").

Indeed, the presumption that the custodial statements of a codefendant or accomplice implicating a defendant are unreliable is so strong that this Court has never countenanced their admission. *See Lee*, 476 U.S. at 544-45; *Bruton*, 391 U.S. at 135-36; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). *See also New Mexico v. Earnest*, 477 U.S. 648, 649-50 (1986) (Rehnquist, J., concurring) (describing presumption as "weighty"). For example, in *Douglas*, this Court reversed a conviction where the prosecutor read to the jury a confession made by the defendant's accomplice during nominal examination of the accomplice. Because the accomplice invoked his Fifth Amendment privilege when called to testify, the Court held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Douglas*, 380 U.S. at 419. "This [unanimous] holding," the Court has explained, "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 541.

Similarly, in *Bruton*, this Court reaffirmed its concern with the grave distortion to the truthfinding process resulting from admission of an accomplice's confession implicating a criminal defendant. The Court held that admission of a codefendant's confession at a joint trial violated the defendant's rights under the Confrontation Clause, notwithstanding the trial judge's instruction to the jury that the confession was admissible only against the codefendant. The Court concluded

that because a confession that incriminates the defendant is so "devastating" and "inevitably suspect," the risk that the jury would not follow instructions was too great to be ignored, underscoring that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 135-36.

To the same effect, in *Lee*, this Court stressed "the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." 476 U.S. at 546. The Court began its analysis by rejecting the "categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" *Id.* at 544 n.5. As the Court explained, "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* The Court then determined that the presumption of unreliability – that the codefendant's confession could not be trusted as to the defendant's participation in the murders – had not been rebutted. Specifically, the Court acknowledged the "reality of the criminal process . . . that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices," and concluded that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.[8]

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[8] Even the dissent in *Lee* recognized that "accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant." *Lee*, 476 U.S. at 552 (Blackmun, J., dissenting). The dissent noted that while it is "against one's penal interest to confess to criminal complicity," one's penal interest can nonetheless "be advanced greatly by ascribing the bulk of the blame to

That same view was reiterated by the Court in *Williamson* in the context of Rule 804(b)(3) of the Federal Rules of Evidence. In *Williamson*, the defendant was convicted based in part on the confession of an accomplice. That confession was broadly self-inculpatory, but also shifted blame to Williamson. Although the Court was divided over the precise proper interpretation of Rule 804(b)(3), it remanded for further consideration the admission of the non-self-inculpatory portions of the accomplice's statements as declarations against penal interest, using a rationale which applies with equal force to Confrontation Clause analysis.

As Justice O'Connor explained, writing for the Court:

> The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded.

Williamson, 512 U.S. at 600 (citation omitted).[9]

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one's confederates." *Id.* The *Lee* dissent underscored that "[i]t is in circumstances raising the latter possibility – *circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest* – that we have viewed the accomplice's statements as 'inevitably suspect.' " *Id.* at 552-53 (emphasis added). Those circumstances, according to the dissent, were presented "starkly" in *Douglas*: "Only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. *By 'fingering' the defendant, he minimized his own culpability.*" *Id.* at 553 (emphasis added).

[9] Prior to *Williamson*, the Supreme Court of Michigan similarly concluded that "*Lee* envisioned a careful and searching analysis of each specific factual assertion contained within any broader statement or confession." *People v. Watkins*, 475 N.W.2d 727, 737 (Mich. 1991). The

The Court therefore held that collateral statements, particularly those that implicate a third party, may not be presumed to be reliable:

> The district court may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. "The arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, *a codefendant's statements about what*

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court noted that *Lee* underscored the unreliability of those particular statements by a codefendant concerning a defendant:

> The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is *presumptively unreliable as to the passages detailing the defendant's conduct or culpability* because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Id. (emphasis added).

Accordingly, the *Watkins* court rejected the assumption underlying the "carry over rule" – that "discrete self-serving or neutral assertions within a broader statement somehow absorb an aura of trustworthiness from separate assertions which are against the declarant's interest. . . . " *Id.* The court therefore addressed the separate and severable statements in the confession, and concluded that neither those statements solely implicating a defendant nor those implicating both an accomplice and a defendant were admissible as declarations against interest under the Confrontation Clause. *Id.* at 738, 746-47. *See* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 804.06[4][d], at 804-55 (Joseph M. McLaughlin ed., 2d ed. 1998) ("[W]hether a declarant is in custody or not, a statement which shifts a greater share of the blame to another person (self-serving) or which simply adds the name of a partner in crime (neutral) should be excluded even when closely connected to a statement that assigns criminality to the declarant.").

the defendant said or did are less credible than ordinary hearsay evidence."

Id. at 601 (quoting *Lee*, 476 U.S. at 541) (emphasis added).[10]

Instead, the Court instructed that statements collateral to self-inculpatory statements must be viewed in context – in light of the surrounding circumstances – to determine whether they are themselves self-inculpatory and therefore admissible. *Id.* at 603-04. Indeed, although the *Williamson* Court was divided over the proper scope of Rule 804(b)(3), there was unanimous agreement that a blame-shifting custodial confession of an accomplice does not bear sufficient reliability for admissibility. *See* 512 U.S. at 600-01 (O'Connor, J.); *id.* at 607 (Scalia, J., concurring); *id.* at 607-08 (Ginsburg, J., concurring); *id.* at 618, 620 (Kennedy, J., dissenting).

In light of the disposition of the case under Rule 804(b)(3), the Court did not address the claim that the statements were inadmissible under the Confrontation Clause, and in particular did not decide whether the hearsay exception for declarations against interest is firmly rooted. However, as Justice O'Connor explained in a portion of the opinion joined by Justice Scalia, "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* at 605 (citing *Lee*, 476 U.S. at 543-45,. If a blame-shifting custodial confession is

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[10] That same point was made by Justice Ginsburg in her concurring opinion:

> [T]he Court recognizes the untrustworthiness of statements implicating another person. A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation. For this reason, hearsay accounts of a suspect's statements implicating another person have been held inadmissible under the Confrontation Clause.

Williamson, 512 U.S. at 607-08 (Ginsburg, J., concurring) (citations omitted).

insufficiently reliable to qualify under a hearsay exception, it must also fail as an exception to the strictures of the Confrontation Clause.

Thus, this Court has consistently concluded that the statements of an accomplice or codefendant which are made during custodial interrogation and which incriminate a criminal defendant are inherently unreliable and therefore inadmissible under the Confrontation Clause. This time-honored principle is amply reflected in the decisions of the lower courts. Most federal appeals courts and state courts of last resort addressing the issue have properly concluded that custodial statements by an accomplice incriminating a criminal defendant are inadmissible under the Confrontation Clause.[11]

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[11] *See Crespin v. New Mexico*, 144 F.3d 641, 648-49 (10th Cir. 1998) (no reason to depart "from the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable" where declarant "may reasonably have thought such a statement would decrease her practical exposure to criminal liability"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 378 (1998); *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) ("[T]here is a[ ] category of statements against penal interest that should generally be regarded as inadmissible under the Confrontation Clause . . . , namely statements accusatory of another taken by law enforcement personnel with a view to prosecution."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (statements were not sufficiently against interest where they were made while in custody, constituted an attempt to curry favor from authorities and trivialized declarant's role by shifting blame to defendant); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (admission of statement by codefendant incriminating defendant violated Sixth Amendment where made in response to custodial interrogation); *United States v. Cochman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (admission of accomplice's confession implicating defendant violated Confrontation Clause); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir. 1982) (noting inherent unreliability of custodial statements implicating a third person, and concluding that statements of accomplice to police did not bear sufficient indicia of reliability); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (written confession made while in custody "may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to

Only a few cases have permitted admission of a statement made while in custody and in response to police interrogation, but none involved a statement like the one at issue in this case: a custodial confession which consistently minimized the declarant's role and shifted blame to others, and in so doing avoided exposing the declarant to a death sentence.[12] In fact,

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gain favor with the Government in the hope of obtaining release or reduced punishment"). *See also Franqui v. State*, 699 So. 2d 1312, 1316, 1319 (Fla. 1997) (circumstances surrounding accomplice's confession admitting his role in robbery but inculpating defendant in shooting were insufficient to overcome presumption of unreliability), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1582 (1998); *Williams v. State*, 667 So. 2d 15, 20-21 (Miss. 1996) (noting "post-arrest statements made by one accused pointing the finger at another are as a matter of common experience among the least trustworthy of statements," and finding statement which "completely inculpated the defendant" inadmissible), *Watkins*, 475 N.W.2d at 742 (admission of codefendants' confessions incriminating defendants violated right of confrontation); *State v. Boyd*, 570 A.2d 1125, 1128-29 (Conn. 1990) (declining to extend rule allowing admission of trustworthy third party statements *exculpating* defendant to include those *inculpating* defendant); *cf. State v. Standifur*, 526 A.2d 955, 963 (Md. 1987) (statement made in custody implicating defendant was not sufficiently reliable to be admissible as declaration against interest).

[12] *See United States v. Keltner*, 147 F.3d 662, 670 (8th Cir.) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"), *cert. denied*, 1998 U.S. LEXIS 7828 (1998); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) ("entire statement inculpated both [defendant] and [declarant] equally" and "neither [attempted] to shift blame to his co-conspirators nor to curry favor from the police or prosecutor"); *see also Brown v. State*, 953 P.2d 1170, 1179-80 (Wyo. 1998) (affirming trial court's admission of only those portions of accomplice's statements that implicated him equally with defendant and noting that trial court had excluded portion of statement identifying defendant as trigger man); *State v. Hallum*, 585 N.W.2d 249, 258 (Iowa 1998) (affirming admission of parts of codefendant's confession implicating codefendant and defendant equally, but finding constitutional violation as to parts of confession implicating defendant alone); *State v. Gilliam*, 635 N.E.2d 1242, 1246 (Ohio 1994) ("Moore's statement did not attempt to exonerate

the vast majority of cases allowing admission of a declaration against interest which inculpated a defendant have not involved statements to known police officers.[13]

Moreover, courts have been particularly reluctant to admit into evidence such uncross-examined hearsay against a criminal defendant when, as here, "the declarant's unavailability is due simply to invocation of the Fifth Amendment in response to actual or potential prosecution." *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993). As the Sixth Circuit has explained,

> [A] rule allowing the government to replace the live testimony of key witnesses with prior grand jury or other extra-judicial statements creates a powerful incentive for prosecutors to acquiesce in, or even plan, the unavailability of witnesses in order to prevent live confrontation and cross-examination of witnesses in the courtroom. It is much easier to plan a trial and convince a jury of a contested set of facts if the jury hears only the direct testimony from one side. It is also more likely that witnesses will exaggerate, omit crucial facts or falsify if they know

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Moore and shift the blame to another co-defendant."); *State v. Nielsen*, 853 P.2d 256, 263-64, 269-70 (Or. 1993) (statement "admitted [declarant's] equally culpable involvement, rather than trying to shift blame"); *State v. Earnest*, 744 P.2d 539, 540 (N.M. 1987) (accomplice stated defendant shot victim in the head but first admitted trying to cut victim's throat at a time when the wounds to the throat were thought to have been cause of death and therefore exposed himself to possible death sentence).

[13] *See, e.g., Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994); *State v. Wilson*, 918 P.2d 826, 837 & n.11 (Or. 1996). The advisory committee's note to Federal Rule of Evidence 804(b)(3), recognizing this distinction, states:

> [A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. . . . On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.

> their story will not be subject to cross-examination. We must hold to the ancient faith of the common law, incorporated by the founders in the Bill of Rights, that live confrontation and cross-examination of witnesses in the courtroom is the key to finding the truth in a criminal trial – a norm of judicial behavior that will be disregarded only for the most compelling reasons.

United States v. Gomez-Lemos, 939 F.2d 326, 333-34 (6th Cir. 1991).[14] That observation fits the Commonwealth's tactics here like a glove.

Thus, for all the foregoing reasons, Mark Lilly's blame-shifting custodial confessions were inherently unreliable.

B. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.

Although this Court has not formally reached – or needed to reach – the issue whether the *general* category of declarations against penal interest is a firmly rooted hearsay exception, instead describing it as "too large a class for meaningful Confrontation Clause analysis," *Lee*, 476 U.S. at 544 n.5,[15]

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[14] Such circumstances are presented, for example, when the "defendant has somehow procured the unavailability of the witness who refuses to testify." *Gomez-Lemos*, 939 F.2d at 334 n.3.

[15] The general exception for statements against penal interest, being of extremely recent vintage, is quite unlike other common law hearsay exceptions which have been deemed firmly rooted. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (exception for co-conspirator statements accepted by Supreme Court over century and a half ago); *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (exception for spontaneous declarations at least two centuries old). Indeed, while the common law admitted statements against pecuniary or proprietary interest, it did not recognize statements against penal interest as a hearsay exception. As one treatise stated more than twenty years ago, "[i]t is today commonly said, and has been expressly laid down by many judges, that the interest prejudiced by the facts stated must be either a pecuniary or a proprietary interest, and not a penal interest." 5 John Henry Wigmore, *Evidence* § 1476, at 349 (James H. Chadbourne ed., rev. vol. 1974). The Advisory Committee Note to the proposed 1972 Federal Rules of Evidence observed that the common law refused "to concede the adequacy of a penal interest." Fed. R. Evid. 804(b)(3) Advisory Committee Note. *See* Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L.J. 851, 859 (1981) ("[t]he common law courts were skeptical of the penal interest exception, using it to admit hearsay in only a few, dramatic instances[,]" and American courts followed the common law rule). It was not until the last few decades that the declaration against interest exception generally has been expanded to include declarations against penal interest. Even then, however, "the situation principally examined was whether a confession or other statement by a third person offered by the defense to *exculpate* the accused should be admissible." 2 Kenneth S. Brown et al., *McCormick on Evidence* § 318, at 341 (John William Strong ed., 4th ed. 1992). Therefore, prior to the adoption of the Federal Rule permitting declarations against penal interest in 1975, the possibility that statements against penal interest by third parties inculpating both the declarant and the defendant "was raised infrequently in cases or the literature." *Id.* at 342.

From a historical perspective, the Fifth Circuit in *Flores* doubted that the exception for statements against penal interest fairly could be deemed firmly rooted. 985 F.2d at 776 n.13. The court therefore concluded that "[t]he relatively recent recognition of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation. . . . " *Id.* at 779. Several states have reached the same conclusion with respect to their own penal interest exceptions. *See Simmons v. State*, 636 A.2d 463, 468-69 (Md. 1994); *Franqui*, 699 So. 2d at 1319; *People v. Newton*, 966 P.2d 563, 574 n.13 (Colo. 1998); *State v. Mason*, 460 S.E.2d 36, 46 (W.V. 1995) (question "resolved implicitly").

> there can be no legitimate question that this Court and others have uniformly deemed the *subcategory* of custodial statements by an accomplice or codefendant which implicate a criminal defendant to be presumptively unreliable under the Confrontation Clause. Accordingly, whatever may be said of

the *general* category of statements against interest, statements within the *subcategory* cannot be said to fall within a firmly rooted hearsay exception. *See Lee*, 476 U.S. at 543-45 & n.5; *Chambers*, 410 U.S. at 299-300 (noting the view that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest").[16]

Four federal appeals courts, expressly following this Court's teachings regarding the inherent unreliability of custodial confessions, have properly held that the exception for declarations against interest cannot be deemed firmly rooted as applied to custodial statements by an accomplice which inculpate a defendant. *Earnest v. Dorsey*, 87 F.3d 1123, 1131 (10th Cir. 1996); *Flores*, 985 F.2d at 776 n.13; *Morrison v. Duckworth*, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991) (state hearsay exception); *Olson v. Green*, 668 F.2d 421, 427-28 & nn.10, 11 (8th Cir. 1982) ("United States Supreme Court decisions, as well as decisions from the courts of appeals, indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."). As the Tenth Circuit recently concluded:

> Generally, evidence is presumptively reliable if it comes within a firmly rooted hearsay exception. [The codefendant's custodial] statement . . . cannot be immunized by the exception for statements against interest. Although it is a statement against penal interest . . . , the Supreme Court has held that

[16] Since statements falling within a firmly rooted hearsay exception are deemed *presumptively reliable*, *Roberts*, 448 U.S. at 66 (firmly rooted "hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' ") (citation omitted); *White*, 502 U.S. at 355 & n.8 ("firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the Confrontation Clause because such statements "are made in contexts that provide substantial guarantees of their trustworthiness"), statements which are *presumptively unreliable* cannot fall within a firmly rooted hearsay exception.

> in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee v. Illinois*, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 2064 n.5, 90 L. Ed. 2d 514 (1986). Moreover, custodial confessions "have traditionally been viewed with special suspicion." *Id.* at 541, 106 S. Ct. at 2062. Therefore, [the codefendant's] statement was "presumptively unreliable," *id.*, and was admissible against [the defendant] only if the state demonstrated "particularized guarantees of trustworthiness." *Id.* at 543, 106 S. Ct. at 2063.

Dorsey, 87 F.3d at 1131.[17]

[17] Two state supreme courts have concluded that a declaration against interest that inculpates a defendant is not within a firmly rooted hearsay exception. *Newton*, 966 P.2d at 574 n.13; *State v. Parris*, 654 P.2d 77, 81 (Wash. 1982); *see* 2 Brown et al., *supra*, *McCormick on Evidence* § 319, at 347. Seven other states, moreover, expressly exclude a statement or confession made by a codefendant or accomplice implicating both himself and the accused from their exception for declarations against interest. *See* Ark. R. Evid. 804(b)(3); Ind. R. Evid. 804(b)(3); Me. R. Evid. 804(b)(3); Nev. Rev. Stat. § 51.345(2); N.J. R. Evid. 63(10); N.D. R. Evid. 804(b)(3); Vt. R. Evid. 804(b)(3). *But see* Ohio R. Evid. 804(B)(3).

The few state supreme courts addressing the narrow issue whether a custodial confession inculpating a defendant falls within a firmly rooted hearsay exception have reached a similar conclusion. *See State v. Hughes*, 510 N.W.2d 33, 38 (Neb. 1993) ("Although the hearsay exception for statements against penal interests encompasses statements that may be inherently reliable, the exception also encompasses statements that are inherently unreliable. Particularly, statements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable. . . . It cannot be said, without a specific showing of trustworthiness, that such a statement should be admitted without the opportunity for cross-examination.") (citing *Lee*); *Watkins*, 475 N.W.2d at 741 ("*Lee* did thereby reject the possibility that an accusatory hearsay statement in a codefendant confession, purportedly constituting a statement against interest, might on that ground be deemed presumptively admissible without any inquiry into its particularized guarantees of trustworthiness."); *Mason*, 460 S.E.2d at 46 ("[A]bsent a showing of particularized guarantees of trustworthiness, the admission of a

Although five federal appeals courts have suggested that the exception for the general category of declarations against penal interest is firmly rooted, these decisions provide no basis, reasoned or otherwise, for departing from the principle that the general category is too large a class for meaningful constitutional analysis where the statement at issue is a custodial confession by an accomplice. Only one of those cases involved a statement by an accomplice made in the course of custodial interrogation, and that case utterly failed to address this principle. *See United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998). The remaining decisions are all readily distinguishable from the case at bar: three addressed statements to family or friends (*United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir. 1991) (finding federal exception firmly rooted in case involving statements made to two associates); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (concluding, based on *United States v. Katsougrakis*, 715 F.2d 769 (2d Cir. 1983), that the exception "would seem to be 'firmly rooted' " in case involving statements made to declarant's girlfriend and stepfather); *Katsougrakis*, 715 F.2d at 776 (statements to friend));[18] while the fourth concerned a non-custodial interview with a Secret Service agent, *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). Unlike custodial confessions, these are not the sorts of statements that this Court has deemed inherently unreliable.[19]

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third-party confession implicating a defendant violates the Confrontation Clause.") (internal quotation marks omitted). *See also State v. Abourezk*, 359 N.W.2d 137, 139-41 (S.D. 1984) (finding *Olson v. Green*, 668 F.2d 421 (8th Cir. 1982), which holds that custodial confessions implicating a third party are not firmly rooted, to be controlling).

[18] *Katsougrakis* was decided prior to this Court's decision in *Lee*, and its continuing viability has been questioned. *See, e.g., United States v. Matthews*, 20 F.3d 538, 545 (2d Cir. 1994); *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993).

[19] Other than the Virginia Supreme Court, the only state court of last resort holding, in the context of a custodial confession, that the exception for declarations against interest is firmly rooted effectively ignored this

Accordingly, a custodial confession incriminating a criminal defendant may be admitted only if, and only to the extent that, it bears particularized guarantees of trustworthiness. *See Lee*, 476 U.S. at 543-45; *Williamson*, 512 U.S. at 605 ("[T]he very fact that a statement is *genuinely* self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause.") (citing *Lee*, 476 U.S. at 543-45) (emphasis added).

C. Mark Lilly's Custodial Confessions Incriminating Petitioner Do Not Bear Particularized Guarantees Of Trustworthiness.

Mark Lilly's custodial statements were inadmissible unless their reliability was supported by "particularized guarantees of trustworthiness." *See Wright*, 497 U.S. at 815. As this Court has made clear, only the circumstances surrounding

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Court's decision in *Lee*. That court barely paid lip service to the presumption of unreliability and inadmissibility that this Court has consistently held attaches to custodial confessions implicating a criminal defendant, concluding that the statement at issue "was not as inherently suspect as the typical co-defendant's confession referred to in [*Lee*]. Moore's statement did not attempt to exonerate Moore and shift the blame to another codefendant." *Gilliam*, 635 N.E.2d at 1246. Not only is the court's conclusion that the declaration did not attempt to shift blame questionable, *id.* at 1248 (Wright, J., dissenting), but the court's reliance on *Lee* is also misplaced. In *Lee*, the precise question the Court asked was "whether the confession was . . . free from *any desire, motive or impulse* [by the codefendant] . . . to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement." *Lee*, 476 U.S. at 544 (emphasis added). *Lee* was not principally concerned with whether the codefendant actually attempted to exonerate himself, but with the fact that a codefendant in custody has a recognized motive to do so, which makes "a codefendant's confession . . . presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages *may well be* the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 545 (emphasis added).

the making of the statements are relevant to that determination. Despite this Court's clear prohibition on the use of corroborating extrinsic evidence to establish particularized guarantees of trustworthiness, the Virginia Supreme Court expressly ignored the circumstances surrounding the making of his statement and instead considered other allegedly corroborating extrinsic evidence presented at trial. There is no reason to depart from this Court's conclusion that the relevant inquiry for determining the trustworthiness of a custodial confession that incriminates a criminal defendant is limited exclusively to the guarantees of trustworthiness that existed when the statement was made. Here, those circumstances make clear that Mark Lilly's statements were not truly self-inculpatory, and therefore belie any guarantees of trustworthiness and, in fact, confirm their inherent unreliability.

1. Only The Circumstances Surrounding The Making Of The Hearsay Statements Are Relevant In Assessing Their Guarantees Of Trustworthiness.

Contrary to the contention of the Commonwealth, Cert. Opp. 28, this Court's holding in *Wright* – that only the circumstances surrounding the making of the statement are relevant to assessing its trustworthiness, without reference to other evidence at trial – applies equally to the determination whether a declaration against penal interest inculpating a defendant bears the requisite guarantees of trustworthiness. A contrary rule would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, and require a showing of prejudice to establish a denial of the right to confrontation, results that are at odds with the requirements of the Sixth Amendment.

In *Wright*, a case involving the hearsay statements of a three-year-old victim of child abuse under a state's residual hearsay exception, this Court held that the particularized guarantees of trustworthiness of a statement which does not fall within a firmly rooted hearsay exception include only

those circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 819. This Court premised its holding on the rationale for permitting exceptions to the hearsay rule. As the Court explained, the various hearsay exceptions are founded on circumstantial guarantees of trustworthiness "that existed at the time the statement was made and do not include those that may be added by using hindsight." *Id.* at 820. If the declarant's truthfulness is so clear from the surrounding circumstances that cross-examination would be of marginal utility, the hearsay rule poses no bar to admission. *Id.* "Because evidence possessing particularized guarantees of trustworthiness must be at least as reliable as evidence admitted under a firmly rooted hearsay exception," this Court concluded that "evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citation and internal quotation marks omitted). This Court therefore prohibited consideration of corroborating evidence because it

> would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with th[is] requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

Id. at 823. Accordingly, this Court held that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

This Court's rationale for limiting the trustworthiness inquiry to the circumstances surrounding the making of the statements applies with equal, if not greater, force in the context of accomplice confessions that incriminate a criminal

defendant.[20] Such a confession, like the child victim's statements in *Wright*, "do[es] not fall within a firmly rooted hearsay exception," and is therefore "presumptively unreliable and inadmissible for Confrontation Clause purposes." *See id.* at 818 (citing *Lee*). Moreover, the unavailable declarant's truthfulness is not "so clear from the surrounding circumstances that the test of cross-examination would be of

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[20] Corroborative evidence is an especially inappropriate factor in the context of custodial confessions because the police, by "co-authoring" a confession, can build references to such evidence into the statement. *See* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogation*, 6 B.U. Pub. Int. L.J. 719, 745 (1997) (corroboration does not satisfy the requirement of trustworthiness of a statement, especially where "the police are co-authors of the confession . . . who can incorporate into the confessions information known only to themselves and to the real perpetrator . . . and thereby, in effect, corroborate the confession") (citations omitted); Gisli Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony* 259 (1992) ("it is clear . . . that innocent suspects do sometimes give information to the police that, on the face of it, seems to have originated from the accused, whereas the information was probably unwittingly communicated to them by the police in the first place," and such apparently "guilty knowledge," which often makes the confession look credible, is then used to substantiate the validity of the confession given). *Cf.* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 604 (1992) ("Limiting evidence to the truthfulness of the declarant rather than the truth of the statement in question. . . . makes perfect sense . . . in terms of restraining the prosecution. The result is that prosecutors cannot bolster weak evidence that would be insufficient to support a verdict by leaning on a witness to produce a statement that a court would then find sufficiently trustworthy to satisfy the Confrontation Clause because it is corroborated by the original evidence. Such an opportunity to bootstrap . . . would give the prosecution an incentive to prop up unsubstantial evidence with hearsay statements obtained through inquisitorial questioning. The majority's opinion [in *Wright*], though couched in terms of reliability and trustworthiness, restrains a prosecutor from attempting to shape the evidence during an interview controlled by an interrogator who induces a statement from a declarant who will be conveniently absent at trial.").

marginal utility." *Id.* at 820. Indeed, like the child's statements in *Wright*, an accomplice confession incriminating a criminal defendant stands in stark contrast to the types of hearsay statements as to which cross-examination would be of marginal utility.[21] Accordingly, here, as in *Wright*, "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.* at 821.

Correctly recognizing that *Wright* is not limited to a child's hearsay allegations of sexual abuse, six federal appeals courts and numerous state courts of last resort have held that under the Confrontation Clause, the trustworthiness of a declaration against penal interest of an accomplice incriminating a criminal defendant must be evaluated independently of any other evidence introduced at trial, and solely on the basis of the circumstances surrounding the making of the statement. *See United States v. Moses*, 148 F.3d 277, 281 (3d Cir.), *petition for cert. filed* (Oct. 7, 1998) (No. 98-6403); *Crespin v. New Mexico*, 144 F.3d 641, 648 (10th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 378 (1998); *United States v. Barone*, 114 F.3d 1284, 1300 (1st Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 614 (1997); *United States v. Matthews*, 20 F.3d

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[21] The basis for admitting dying declarations, excited utterances, or statements made for the purposes of medical diagnosis or treatment – all of which have been found to constitute firmly rooted hearsay exceptions, *Pointer*, 380 U.S. at 407; *White*, 502 U.S. at 743 n.8 – is that "such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation," and that "persons making such statements are highly unlikely to lie." *Wright*, 497 U.S. at 820. An accomplice confession incriminating a criminal defendant, by contrast, is not only considered less reliable than ordinary hearsay, *Lee*, 476 U.S. at 541, but is deemed presumptively unreliable and inadmissible for Confrontation Clause purposes, because of the inherent motive "to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.

5.8, 545 (2d Cir. 1994); *Flores*, 985 F.2d at 775; *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir. 1991); *see also People v. Newton*, 966 P.2d 563, 574 (Colo. 1998); *State v. Hallum*, 585 N.W.2d 249, 257 (Iowa 1998); *Franqui v. State*, 699 So. 2d 1312, 1318 (Fla. 1997); *Williams v. State*, 667 So. 2d 15, 21 (Miss. 1996); *State v. Mason*, 460 S.E.2d 36, 46 (W.Va. 1995); *Simmons v. State*, 636 A.2d 463, 470 (Md. 1994); *State v. Hughes*, 510 N.W.2d 33, 39 (Neb. 1993); *State v. Nielsen*, 853 P.2d 256, 267 (Or. 1993); *State v. Cook*, 610 A.2d 800, 804-05 (N.H. 1992); *People v. Watkins*, 475 N.W.2d 727, 745-46 (Mich. 1991); *State v. Whelchel*, 801 P.2d 948, 957 (Wash. 1990).

None of the few courts that look to extrinsic corroborating evidence in determining whether the accomplice confession at issue bears particularized guarantees of trustworthiness, including the Virginia Supreme Court, provides any reasoned basis for not applying *Wright* in the context of declarations against penal interest. In fact, like the Virginia Supreme Court, 499 S.E.2d at 533-34, the Eighth Circuit did not even mention *Wright* in its analysis, concluding instead that declarations against interest constitute a firmly rooted hearsay exception. *Keltner*, 147 F.3d at 671. Other courts, while relying on extrinsic corroborative evidence, actually purported to follow this Court's decision in *Wright*. *See Gilliam*, 635 N.E.2d at 1246 (citing *Wright* but confusedly concluding that statement against interest was admissible under the Confrontation Clause because it met requirements of exception – statement tended to subject declarant to criminal liability and there were sufficient corroborating circumstances – and it was admissible pursuant to a firmly rooted hearsay exception and there were particularized guarantees of trustworthiness surrounding statement); *id.* at 1247 (Wright, J., dissenting) ("Ironically, the majority cites the very page of the opinion in [*Wright*] which repudiates its position."); *Brown v. State*, 953 P.2d 1170, 1180 (Wyo. 1998) (citing *Wright* while finding requisite guarantees

of trustworthiness in part because statements were "substantially corroborated").

Moreover, consideration of extrinsic corroborative evidence to determine the admissibility of the custodial blame-shifting statement of an accomplice would impermissibly threaten to convert the admissibility issue into a trial on the merits,[22] effectively making the determination of whether a constitutional violation has occurred turn on whether any error in allowing the statement to be admitted was harmless. This Court has concluded, however, that "the focus of the Confrontation Clause is on the individual witnesses," and not "on the outcome of the entire trial," for "[i]t would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Accordingly, admission of a blame-shifting custodial statement by a non-testifying accomplice which incriminates a defendant must turn on the particular "witness" and the circumstances surrounding the making of his statement, and not on other corroborative evidence presented at trial.

Thus, under the Confrontation Clause, the admissibility of Mark Lilly's statements to police incriminating Petitioner turns solely on the circumstances surrounding their making.

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[22] *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1022 (1998) ("The reliability determination threatens to become a shadow of the trial on the merits – a battle over the ultimate factual issues at stake in the prosecution, based on all the evidence presented at trial. To prevent this from happening, the court must crop the inquiry. One way is to exclude from it information that might substantially help prove the accuracy of the particular statement not because it tells us anything about the making of the statement but only because it points in the same direction as the statement.").

2. The Circumstances Surrounding The Making Of Mark Lilly's Statements Incriminating Petitioner Confirm That Those Statements Are Unreliable And Hence Inadmissible.

Here, the circumstances surrounding the making of Mark Lilly's statements implicating Petitioner completely undermine their reliability. There is nothing in those circumstances that provides any basis for rebutting the presumption of unreliability. *See Wright*, 479 U.S. at 881. In fact, Mark Lilly's statements suffer from every indicia of unreliability that prevents admission of a custodial confession implicating another. Indeed, such statements, when viewed in their full context, cannot be considered truly self-inculpatory, and should never be admitted without the opportunity for cross-examination.

Mark Lilly made his statements after having been arrested and held in custody for several hours, and his statements were not spontaneous, but instead were made in response to police interrogation by several officers over the course of more than an hour. This Court and lower courts have consistently recognized that such circumstances render statements incriminating a defendant unreliable.[23]

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[23] *See Dutton*, 400 U.S. at 87, 88-89; *Chambers*, 410 U.S. at 300; *United States v. Costa*, 31 F.3d 1073, 1079 (11th Cir. 1994); *Fuson*, 773 F.2d at 61; *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979); *Whelchel*, 801 P.2d at 955-56.

The significance of custodial interrogation and its effects on suspects must not be underestimated. A growing body of scholarship studying the psychological effects of interrogation techniques suggests that the assumption underlying such techniques – that an innocent person would not confess – does not hold true. As Gisli Gudjonsson, a clinical psychologist and former police interrogator, has concluded, "The view that apparently normal individuals would never seriously incriminate themselves when interrogated by the police is totally wrong, and this should be recognized by the judiciary." Gudjonsson, *The Psychology of*

Mark Lilly's "unsworn statement[s] w[ere] [also] given in response to questions of police" *after* they had questioned Barker and "no doubt knew what they were looking for," a circumstance which further indicates that the statements could not be trusted as to Petitioner's participation in the crimes. *Lee*, 476 U.S. at 544; *Watkins*, 475 N.W.2d at 746; *Hughes*, 510 N.W.2d at 818; *see also Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985). Because the officers clearly knew what they were looking for, they used a question and answer format in conducting their interrogation. Mark Lilly's statements, therefore, "consist of detailed, specific questions and specific answers; none involves any kind of unsolicited narrative." *Whelchel*, 801 P.2d at 955-56. The use of such suggestive or leading questions has been criticized as a form of deceptive interrogation which may yield false or unreliable confessions. Gisli Gudjonsson & Noel K. Clark, *Suggestibility in Police Interrogation*, 1 Soc. Behav. 83, 85 (1986); *see supra* n.20.

Furthermore, as this Court and others have concluded, having been arrested and subjected to interrogation regarding a number of robberies and a murder, Mark Lilly had a tremendous incentive to minimize his own role and to shift or spread

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Interrogations, *supra*, at 259, 323; George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 Tex. L. Rev. 231, 258-9 (1988); Johnson, *False Confessions*, *supra*, 6 B.U. Pub. Int. L.J. at 721; Richard J. Ofshe & Richard A. Leo, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 Denv. U. L. Rev. 979, 983 (1997); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 Crime, Law and Social Change 35, 37 (1992).

This scholarship likewise undermines the already tenuous rationale underlying the exception for declarations against penal interest – that an innocent person would not make a statement incriminating himself unless it were accurate. *See* Michael D. Bergeisen, Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189, 1210, 1217 (1978); Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 163 (1983).

blame, curry favor or divert attention to another, an incentive which renders his statements regarding what Petitioner said or did unreliable. *See Lee*, 476 U.S. at 545; *Williamson*, 512 U.S. at 604. *See also, e.g., Flores*, 985 F.2d at 782; *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981); *Watkins*, 475 N.W.2d at 743-44.[24]

Mark Lilly's statements to police bear out this incentive. As the Virginia Supreme Court itself recognized, Mark Lilly's statements were self-serving, shifting principal responsibility to others and offering claims of mitigating circumstances. Mark Lilly trivialized his role to the point that he suggested he was something of a bystander who happened to be present when the various crimes were committed. He shifted virtually all responsibility for criminal conduct onto Barker and Petitioner, essentially identifying Barker as responsible for the robberies and Ben Lilly as responsible for the carjacking and shooting. His statements implicating Petitioner are not self-inculpatory, and are not reliable. *See Lee*, 476 U.S. at 544-45 (record evidence documented reality that once "the jig is up,"

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[24] Commentators have likewise recognized the strong presumption of inadmissibility of declarations against interest inculpating an accused, particularly when made in police custody. *See* 5 Weinstein & Berger, *Weinstein's Federal Evidence*, *supra*, § 804.07[1], at 804-64 ("Because of the danger of prejudice involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused."); 3 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 1848-49 (7th ed. 1998) ("[I]t will be most unlikely for a postcustodial confession to be considered sufficiently disserving and reliable to qualify under either Rule 804(b)(3) or the Confrontation Clause when it directly implicates a nondeclarant. . . . "); Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 Wm. & Mary Bill Rts. J., 753, 764-65, 775-79 (1996) (accomplice's confession to police is unreliable per se); Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 8.64, at 1398 (1995); Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1, 35-38 (1987).

partners in a crime "lose any identity of interest" and "immediately become antagonists"); *id.* at 553 (Blackmun, J., dissenting).[25]

To the extent, moreover, that Mark Lilly implicated himself in any crimes, he inculpated Petitioner in a significantly more serious crime, which further undermines the reliability of his statements incriminating Petitioner. *See United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981). Finally, Mark Lilly's reliance on his drunkenness to explain his lack of

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[25] *See also Crespin*, 144 F.3d at 647, 648; *United States v. Innamorati*, 996 F.2d 456, 475 (1st Cir. 1993) (finding inadmissible a co-defendant's statement that "admitted to a few acts of logistical assistance" while maintaining that "others were guilty of wrongdoing from which [the declarant] had been excluded but happened to have some knowledge"); *Flores*, 985 F.2d at 782 ("Taking on the full blame for a minor role in an offense . . . does little to demonstrate trustworthiness because the declarant still has the motive to shift the blame to others so as to receive a lesser penalty."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (statements unreliable where they "trivialized [the declarant's] role in the drug conspiracy by pointing to Magana as the 'kingpin' "); *Sarmiento-Perez*, 633 F.2d at 1102 ("[The] declarant might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement[s] as a whole – including the ostensibly disserving portions – to be *in* his interest rather than against it."); *Love*, 592 F.2d at 1025-26 (a co-defendant's statement to police was inadmissible because the declarant, fearing prosecution for aiding and abetting, "may well have believed it was in her best interest to make a statement implicating [the defendant] as the instigator in order to ingratiate herself with the F.B.I. and divert attention to another"); *Simmons*, 636 A.2d at 471 (statement inadmissible where "Coley admitted only to playing a minor role – knocking on the door; he denied taking anything, and put the weapons used in the hands of other members of the gang"). *See also* 4 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 489, at 1141 (1980) ("A statement conceding a minor role to declarant and attributing to another the major responsibility resembles more an attempt to foist blame on the other while minimizing declarant's responsibility, and thus the statement as a whole advances far more than it impairs the interests of the declarant. . . . ").

memory and his participation in the crimes likewise undermines the reliability of his statements incriminating Petitioner, *Crespin*, 144 F.3d at 648, as does the fact that Petitioner did not corroborate, or otherwise adopt, Mark Lilly's statements incriminating him, *Fuson*, 773 F.2d at 61 (statement lacked indicia of unreliability in part because "the petitioner [did not] corroborate [the codefendant's] statements with a subsequent confession"); *Latine v. Mann*, 25 F.3d 1162, 1166-67 (2d Cir. 1994) (a custodial confession incriminating a defendant is inadmissible against the defendant "unless other evidence demonstrates that the defendant adopted or authorized the statement").[26]

Thus, based on the circumstances surrounding the making of Mark Lilly's statements – the only indicia of reliability permitted under this Court's caselaw for determining the statements' trustworthiness[27] – those statements do not bear particularized guarantees of trustworthiness. Accordingly, since the presumption of unreliability has not been rebutted, admission of Mark Lilly's statements posed the very "danger against which the Confrontation Clause was erected – the

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[26] The Commonwealth mistakenly relies on the fact that "[t]he officers [interrogating Mark Lilly] . . . all were available at trial for cross-examination." Cert. Opp. 24. As this Court stated in *Douglas*, in words equally appropriate here,

> the opportunity to cross-examine the law enforcement officers [was not] adequate to redress this denial of the essential right secured by the Confrontation Clause. . . . [T]heir evidence tended to show only that [the accomplice] made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of [the accomplice] to test the truth of the statement itself.

380 U.S. at 419-20.

[27] Even if the extrinsic evidence were considered relevant to determining the trustworthiness of Mark Lilly's statements to police were considered, those statements would nonetheless be inadmissible because the extrinsic evidence contradicts – and does not corroborate – Mark Lilly's statements. *See supra* 16-18.

conviction of a defendant based . . . on presumptively unreliable evidence." *Lee*, 476 U.S. at 543. Admission of Mark Lilly's statements violated Petitioner's fundamental constitutional right to confront the witnesses against him, and "call[ed] into question the ultimate 'integrity of the fact-finding process' " underlying Petitioner's trial, conviction and death sentence. *See Chambers*, 410 U.S. at 295 (citation omitted); *Danner v. Kentucky*, No. 97-2057, 1998 WL 348372, at *2 (Nov. 16, 1998) (Scalia, J., dissenting from denial of *cert.*) (denial of right of confrontation "was such an obvious and blatant violation of the Sixth Amendment that it would warrant summary reversal").

CONCLUSION

For all the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed and this matter remanded for a new trial.

Dated: New York, New York
December 22, 1998

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APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Are Benjamin Lilly's Confrontation Clause claims barred from review because they were not presented in a timely manner to the Virginia Supreme Court?

2. Is the hearsay exception for statements against penal interest "firmly rooted" in the law for Confrontation Clause purposes?

3. May a state court, after finding that a declarant's hearsay is against his penal interest, require additional, independent corroboration of the hearsay before finding it sufficiently trustworthy to be admitted into evidence?

4. Did the state trial and appellate courts abuse their discretion in finding that Mark Lilly's hearsay statements bore adequate indicia of reliability such that their admission into evidence did not violate the Confrontation Clause or constitute reversible error?

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STATEMENT OF THE CASE

On December 4, 1995, the petitioner, Benjamin Lilly ("Lilly" or "petitioner"), got together with his younger brother, Mark Lilly, and Mark's teen-aged roommate, Gary Barker, at the petitioner's home in Riner, Virginia, to drink and "smoke a little . . . pot." (JA 101-102).[1] Later that night, they decided to go to Floyd County to Danny Sanders' home. (JA 102). The petitioner drove them in his Mercury Cougar. (JA 101).

When they arrived at Sanders' home and found that Sanders was not there, they "decided just to go on in and help [them]selves." They "[b]usted out the front glass in the door," went inside and took nine bottles of liquor and three loaded guns. (JA 103-104). The guns were a .35 caliber rifle, a 16 gauge shotgun and a .38 caliber pistol. (JA 103). They also took a safe that they later "busted" open. Inside they found old coins, a money clip, stamps and knives which they split among themselves. They began drinking the liquor and decided to drive to Warren Nolen's home, the petitioner's friend, to see if they could "trade the guns for some dope." (JA 105-107). Nolen's girlfriend, Patricia Quesenberry, however, told them to leave. (R. 163-167, 176-178).

The three men then drove to the trailer in Blacksburg where Mark and Gary lived with "A.J." Fall, and spent the remainder of the night there. (JA 108). They left A.J.'s together on December 5 at about noon (R. 956) and drove the backroads, drinking the stolen liquor. They stopped at a small country store, pumped gas for the car and left without paying. (JA 109). They stopped in a wooded area

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[1] References to the printed Joint Appendix will be denoted as "(JA ___)." References to the trial court record will be denoted as "(R. ___)." References to the Joint Appendix filed below will be denoted as "(Va. Sup. Ct. App. ___)."

where Gary fired the rifle and both the petitioner and Mark took turns firing the pistol. (JA 110). They stopped at a church where Gary and Mark shot at some geese with the rifle and shotgun. They killed one goose and placed it in the trunk of the car. (JA 112).

They drove back to the Blacksburg trailer park where they tried, unsuccessfully, to sell or trade the guns for "dope." (JA 112-115). At about 6:00 p.m., the three drove to a bar in Blacksburg where they again tried to sell the guns. (R. 190-196).

They were driving along Prices Fork Road heading into Blacksburg when Lilly's car broke down at the top of a hill. Lilly coasted the car to a position on the wrong side of the road and across from a convenience store. (JA 117-119). The men left the car and removed the license plates, liquor and guns, with the intention of "stashing" them in the woods until they could "steal" a car to "get out of there." (JA 119). The petitioner directed the others to wait in the woods and "he would get us a car." (JA 119). Gary had the rifle, Mark had the shotgun and the petitioner had the pistol. (JA 119).

Tom Staeger and Alex DeFilippis arrived at the convenience store soon after Lilly abandoned his car. Tom and Alex had been college roommates and friends for four years. Alex, an environmental science major, planned to spend the holidays with his family in Italy. (R. 80-81). The two boys went to the convenience store to copy some class notes. They drove in Alex's maroon Plymouth. (JA 80-86). Alex wore glasses and a watch and carried a wallet with a few dollars in it. (R. 80-81). On their way to the store, Alex hit a curb with his right front tire. (R. 86). When they arrived at the store, Alex stopped to look at the tire while Tom went inside to copy the notes. (R. 87).

The petitioner approached Alex, pointed the pistol at him and demanded his money. (JA 121). Alex handed over his wallet. (JA 121). The petitioner called to his brother and Gary and they all got in Alex's car. (JA 121-122). The petitioner drove, Gary sat in the passenger's seat and Mark was in the back seat. The petitioner ordered Alex to sit in the back with Mark. (JA 121).

When Tom came out of the store, neither Alex nor his car was there. Tom called their apartment to see if Alex had returned, found out that he had not, and then noticed Lilly's abandoned car across the street. (R. 83). Tom called "911" and the Blacksburg Police Department responded at about 7:20 p.m. (R. 84).

Meanwhile, Lilly drove and, during the ride, Alex told his abductors that he would have given them a ride if they had asked, implored them to take him back to the store to pick up his friend and promised he would drive them wherever they needed to go. (JA 123). The petitioner instead drove to a deserted stretch of property owned by the Norfolk & Southern Railway Company. (R. 282, 325). Mark and Gary told Alex to close his eyes when they opened the car door to get out so that Alex could not see their faces. Mark carried the pistol in his waistband at that time. (JA 124).

After they all left the car, Mark told Alex to start walking and then the petitioner ordered Alex to take off his clothes. (JA 127). The night was cold and windy and it started snowing later. (R. 295). Alex stripped down to his underwear briefs and socks. (JA 127). Gary and Mark thought they were leaving Alex there, forcing him to walk to a phone. (JA 128). Gary got back into the car in the driver's seat and Mark got in on the passenger's side. (JA 129). The petitioner demanded that his brother give him the pistol, which Mark did. (JA 129).

Lilly ran after Alex, who had walked about fifty yards, turned him around and shot him four times with the pistol. (JA 128-129). Three of the shots were to Alex's head: one bullet went straight through the right side of his upper lip; one bullet went into his neck under his left earlobe and out through the back of his neck; one bullet went into his head above the right ear, through his brain and lodged in the left temporal bone. A fourth bullet went straight through his right forearm. (R. 534-535). All four shots were fired from a distance of more than two feet. (R. 535). A zigzagging blood trail showed where he had staggered approximately 50 feet before he fell. (R. 296). Alex died shortly after he was shot in his brain. (R. 537).

After the shooting, the petitioner returned to the car and told Gary and Mark that "that boy saw his face" and "I've been in the penitentiary and I ain't going back." (JA 130). They drove to the river and threw away items they believed contained their fingerprints: Alex's clothing and backpack and the plastic cover over the car's speedometer. (JA 131). They discussed where to hide out and the petitioner suggested that they stay with friends of his in West Virginia. (JA 134). To obtain money for the getaway, they drove to the H&L Market in Eggleston. When they arrived, they argued over who would carry the gun inside. (JA 134). The petitioner said that he had done "what he had to do already," so Gary carried the pistol inside. (JA 135). Lilly went in armed with the eight-inch knife he had stolen from Sanders' house. (R. 1069, 1082). They entered the store and robbed the owners of $425.00 in cash, food stamps, a radio, beer, tobacco, gloves and sunglasses. (R. 995-1006, 1063-1072). During the robbery, the petitioner brandished the knife, ordered the owner's wife to lie on the floor and threw the knife into the floor near her. (R. 1066-1069, 1081). After the robbery, they

divided the money and decided it was not enough. (JA 138).

They drove to the M&W Market in Pembroke. The petitioner stayed in the car. Gary and Mark went into the store and Gary took the clerk's money at gunpoint. (JA 139-140, 348-350). The owner pursued the robbers in his own car long enough to get the license plate number. (R. 1096). The petitioner was driving Alex's car, Mark was in the passenger seat and Gary was in the back seat. (JA 141). When they saw the store owner in pursuit, Gary pointed the rifle out of the window and fired it but did not hit anything. (JA 142; R. 1102).

Officers Price and Tilley each had responded to the scene of the Eggleston robbery and were on their way to the reported second robbery when they came upon the robbers' car headed towards them. (JA 57; R. 264). The car had stopped due to engine trouble and the petitioner, Mark and Gary were unloading the guns, radio, beer and other evidence from the car. (JA 142-143). When the officers arrived, Gary ran a few yards down an embankment and hid with the rifle. (JA 143-144). Mark ran away through the woods.

The petitioner was apprehended as he left the car, armed with the shotgun. (JA 83). The officers disarmed the petitioner and found the knife in his pants pocket. (JA 58-59). The petitioner falsely told them that there were three other men with assault weapons, that one of them was named Mike Rader and that he (Lilly) was an undercover officer with the Montgomery County Sheriff's Office who had been picked up by the others while he was hitchhiking. (JA 59-60).

Several officers arrived at the scene and began to search for the other suspects the petitioner had described. The officers heard Gary crying in a ditch about fifty feet from the car. (R. 436). He was sitting with the barrel of

the rifle up against his head and the officers talked him into surrendering. (R. 419). The petitioner asked the officers if he could use their loudspeaker to talk to his brother and he was allowed to do so. (JA 216). Lilly called Mark by name, asked him to "come out" and said, "You're not the one that's really in trouble here. You're not the one that's really done anything wrong." (JA 216). The officers found Mark a short time later walking along Route 460. He falsely identified himself as Mark Rader. (R. 447).

The petitioner was placed in a police car while the search for the others proceeded. Chief Whitsett was standing guard alongside the car. (JA 218). At that time, the only crimes the police knew about were the two robberies in Eggleston and Pembroke. (JA 221). The car window was down a few inches and the petitioner asked if Whitsett "would do him a special favor." The petitioner asked Whitsett to put the barrel of the officer's shotgun in the petitioner's mouth and pull the trigger. (JA 219-220). Whitsett told him he could not oblige and asked, "if I [Whitsett] looked like a murderer?" (*Id.*). Then the petitioner said something to prompt Whitsett to ask, "What does a murderer look like anyway?" The petitioner responded, "me." (JA 220). The petitioner then stated that "he was going to hell to meet his [other] brother" who had committed suicide eight years before. (JA 221).

Ben Lilly, Mark Lilly and Gary Barker were taken to the Giles County Sheriff's Office. Officer Price interviewed Gary about the robberies. During the interview Price learned from a police dispatcher that the car the trio had been driving had been reported stolen and its owner abducted. (R. 241). Price asked Gary about the car and Gary became "very emotional" and said that "a bad thing had happened." (R. 242). Gary then recounted in detail

what had happened, including the fact that Ben Lilly had shot and killed Alex DeFillipis. Gary drew a map directing the officers to the location of Alex's body and assisted in the recovery of Alex's clothing. (R. 332).

Mark Lilly was interviewed next, first by Officer Price and then by Montgomery County Officers Hamlin and Fleet. (JA 224, 298). Contrary to the petitioner's assertion (Pet. Br. 6 n.1), Mark did not "initially refuse" to be questioned by the officer and nothing in the record supports such a conclusion. Mark told Officer Price that he was "still under the influence" and "not feeling very well." (JA 245). Officer Price took Mark "downstairs" and gave him some water. The interview did not commence until Mark stated that he had sobered up enough to talk. (*Id.*). Mark then was given *Miranda* warnings and agreed to talk about the crimes. (JA 240-241). During the interview, Officer Price refused to tell Mark what Gary and the petitioner had told the police except that "they said [Mark] didn't do it." (JA 257). Mark's story was consistent with what Gary had said. Mark expressed reluctance and emotion when he related the fact that his brother had shot Alex. (JA 257, 306-307). He acknowledged that he himself would be charged with murder and sent to prison. (JA 307). He also acknowledged that he had handled and shot the .38 pistol earlier during the day of the murder. (JA 273). During the interviews, the officers made no promises of leniency, express or implied.

Ben Lilly was interviewed last by Officer Price. He falsely claimed that he was with Mark, Gary Barker and one Mike Rader, and that the others had committed the robberies in Eggleston and Pembroke. (JA 63-79). He falsely denied that he knew who owned the stolen car. (JA 75). He claimed that he was forced at gunpoint to participate in the robberies but he made no mention of

the larceny of the weapons from Danny Sanders' house or the murder and robbery of Alex DeFilippis. (JA 68, 77).

After his interview, Price asked the petitioner if he would submit to a Gun Shot Residue test. (JA 80). The petitioner declined the request and began to rub his hands together and on his pants legs. (JA 81, 88). Both Mark and Gary readily submitted to the test. (R. 486-487).

The officers recovered the murder weapon about seventy-five feet away from Alex's car in a ditch. (R. 468). The day after the murder, a citizen found Alex's wallet about a quarter of a mile from Alex's car in the direction of Pembroke. (R. 449). When the petitioner was arrested, he had on his person several coins which had been stolen from Sanders' house. (JA 87). Alex's watch was recovered from the back of his car. (R. 341). The bullet recovered from Alex's brain matched the bullets fired from the .38 caliber revolver that had been stolen from Sanders' house. (Va. Sup. Ct. App. 3522).

A forensic expert found blood on the bottom right leg of the blue jeans the petitioner wore on December 5, but the small amount of blood did not permit a DNA test to be performed. (JA 95-96). Blood found on Gary Barker's underwear was determined by DNA testing to be his own blood. (R. 575). No blood was found on Mark Lilly's clothing. (R. 568).

The petitioner was tried by a jury in the Circuit Court of Montgomery County for the capital murder of Alexander DeFilippis as well as for robbery, abduction, carjacking, possession of a firearm by a felon, and four offenses of the illegal use of a firearm. At trial, Gary Barker testified extensively against the petitioner. (JA 97 *et seq.*). His testimony mirrored the confessions given by Mark in all material respects except that it contained far greater detail about the petitioner's actions: (1) only Gary said that he, Mark and the petitioner went to Warren

Nolen's – the petitioner's friend – to try to sell the loot they had stolen from Danny Sanders' house (JA 106-107); (2) only Gary said they ended up at the petitioner's sister's house where they busted open the safe and split the loot (JA 105); (3) only Gary said they tried to sell the guns for dope at various places, including a bar in Blacksburg (JA 114-115); (4) only Gary said that during the ride to Whitethorne Alex had begged them to stop (JA 123); (5) only Gary said that the petitioner, after shooting Alex, said he did it because Alex had seen his face and he was not going back to the penitentiary (JA 130); (6) only Gary said that the petitioner asked for a beer after the shooting (JA 130); (7) only Gary said the petitioner suggested they go to West Virginia to hide out with the petitioner's friends (JA 134); and (8) only Gary said they agreed after robbing the owners of the first store that they needed more money to get out of town. (JA 138).

The Commonwealth called Mark Lilly to testify as its last witness, but Mark invoked the Fifth Amendment. (JA 238). The trial court found Mark Lilly to be unavailable for purposes of the hearsay exception for declarations against penal interest and permitted the Commonwealth to introduce into evidence his tape-recorded confessions. (JA 244-274, 298-321). The trial court made the following findings:

> Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:
>
> The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment right against self-incrimination, then in those

events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't [sic] against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole.

* * *

All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the

Commonwealth has met its burden in determining the unavailability of his testimony, so, therefore, in conjunction with the Court's prior ruling that finding is made.

(JA 234-236, 239).

The petitioner did not testify in his own defense, but attempted to impeach Gary's testimony with evidence that Gary had a reputation for untruthfulness (JA 332, 357) and that Gary had made statements that he would kill his best friend and anyone who tried to arrest him. (JA 344, 345).

Contrary to the petitioner's assertions that the prosecutor used Mark's statements to "cement" his case during closing argument (Pet. Br. 8, 12), the prosecutor in fact barely mentioned Mark. The prosecutor told the jury that "Gary Barker is the key to the case . . . " (JA 360) and then proceeded to argue that the evidence independent of Mark's confession corroborated Gary's testimony and demonstrated that the petitioner's version of facts was a lie. The prosecutor only twice mentioned Mark as a witness to the shooting in his opening argument. (JA 363-364). In his rebuttal argument, the prosecutor again mentioned Mark briefly, but only to respond to defense argument regarding inconsistencies between Mark's confession and Gary's testimony. (JA 389-392).

On October 25, 1996, the jury returned guilty verdicts on all nine charges. (JA 405-406). During the separate sentencing hearing on October 28, 1996, the Commonwealth presented evidence of the petitioner's extensive criminal history, including over thirty convictions for crimes ranging from public drunkenness to assaults, breaking and entering, larceny and malicious wounding. (R. 1334-1384). The jury sentenced Lilly to death, finding the petitioner a "future danger" and his crime "vile." (JA 407). It also sentenced him to life imprisonment for robbery, life imprisonment for carjacking, ten years for

abduction, five years for possession of a firearm by a felon, and four terms of three years each for the four convictions of the illegal use of a firearm. (JA 408-409).

During the post-verdict hearing on February 11, 1997, the trial judge considered a probation officer's report and the petitioner presented the testimony of, among others, Mark Lilly. Mark testified that he had lied to his attorneys and to the police and that it was he, rather than his brother, who had robbed Alex DeFilippis. (JA 397-400; R. 1615-1617). Mark denied shooting Alex. (JA 399). He stated that he did not know who shot Alex and that he could not say that his brother had not shot him. (JA 400; R. 1619).[2] At the conclusion of the hearing, the trial court sentenced the petitioner in accordance with the jury's verdicts.

On appeal to the Virginia Supreme Court, the petitioner made two arguments with respect to the admission of Mark's confessions. He first argued that, as a matter of state law, the hearsay exception for declarations against penal interest never should apply to evidence offered by the Commonwealth against a defendant. (JA 475-479). Lilly's primary contention was that the Virginia Supreme Court had erred when it allowed such hearsay in an earlier case, *Chandler v. Commonwealth*, 455 S.E.2d 219 (Va.), *cert. denied*, 512 U.S. 889 (1995). With the exception of a passing reference to "the confrontation clause, the fifth, sixth, and fourteenth Amendments" in the heading of his argument, and one reference to *Chambers v. Mississippi*, 410 U.S. 284 (1973), in the argument, Lilly's first argument was devoid of any reference to federal law.

---

[2] Mark's "recantation" was thoroughly impeached by his admissions that he had decided to testify only after he had been sentenced for his own crimes, after his family had blamed him for his brother's conviction and after his mother had filed to take away custody of his child. (R. 1617; JA 400).

Lilly's second argument, again under Virginia case law, was that Mark's pretrial statements were not truly against his penal interest. (JA 479-484). Lilly recited the federal constitutional amendments in the heading to his argument and contended at the end in conclusory fashion that the Constitution had been violated simply because he had not been able to confront Mark Lilly at trial. (JA 479, 484). Lilly's argument, however, was based upon state law governing the issue as expounded in two decisions from the Virginia Supreme Court. (JA 479-480). Lilly did not rely on a single federal case. Indeed, nowhere in his opening brief did Lilly present the three claims he makes in this Court that the Confrontation Clause categorically prohibited admission of an accomplice's custodial statements, that the hearsay exception is not firmly rooted, or that corroborating evidence should not have been considered. The Commonwealth's response to these arguments was three-fold: (1) *Chandler* had been decided correctly and the Constitution did not bar the use of hearsay against a defendant; (2) the evidence was admissible because it came in under a firmly rooted exception to the hearsay rule and because it was reliable considering all the evidence; and (3) any error was harmless. (JA 536-545).

Lilly's reply brief cited two cases for the contention that accomplice's confessions are presumptively unreliable – *Lee v. Illinois*, 476 U.S. 530 (1986) and *Williamson v. United States*, 512 U.S. 594 (1994) – and then argued that the Commonwealth's harmless error argument had no merit. (JA 571-573). Nowhere in the reply brief did Lilly argue his three current constitutional claims.

The Virginia Supreme Court, on April 17, 1998, made the following findings in its unanimous decision affirming the trial court's evidentiary ruling:

> At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right

against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.

In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."

To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. *Ellison v. Commonwealth*, [247 S.E.2d 685, 688 (Va. 1978)]. "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." *Boney v. Commonwealth*, [432 S.E.2d 7, 10 (Va. App. 1993)]; *see also Newberry v. Commonwealth*, [61 S.E.2d 318, 326 (Va. 1950)].

To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. *Chandler v. Commonwealth*, [455 S.E.2d at 224-225]. Rather, the statement's admissibility is

based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. *Id.*

Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to *Chandler*, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, *Chandler* improperly enlarged the exception to permit the Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that *Chandler* was wrongly decided and should be overturned. We disagree.

We recognize that *Ellison*, *Newberry*, and other cases that applied this hearsay exception prior to *Chandler* involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in *Ellison*, the admission of such statements

> must be left to the sound discretion of the trial court, ***to be determined upon the facts and circumstances of each case***. But, in any case, once it is established that a third-party confession has been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of *Hines [v. Commonwealth*, 117 S.E. 843, 849 (Va. 1923)], the case is one where "there is anything substantial other than the bare

> confession to connect the declarant with the crime."

219 Va. at 408-09, 247 S.E.2d at 688.

Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree.

The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even

though there is no confrontation with the declarant. *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process. ' " . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.

White v. Illinois, 502 U.S. 346, 356-57 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence.* *See Randolph v. Commonwealth*, [482 S.E.2d 101, 105 (Va. 1997)]; *Raia v. Commonwealth*, [478 S.E.2d 328, 331 (Va. 1996)].

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* Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

Lilly v. Commonwealth, 499 S.E.2d 522, 533-534 (Va. 1998). (JA 591-595).

After the Virginia Supreme Court issued its decision, Lilly petitioned for rehearing, arguing for the first time that the Confrontation Clause absolutely prohibited the admission of a custodial confession, that the hearsay exception was not "firmly rooted," and that under *Idaho v. Wright*, 497 U.S. 805 (1990), the court could not take into consideration independent evidence that corroborated and validated the truth of the confessions Mark had made. (JA 604-606, 610). The Virginia Supreme Court denied the petition for rehearing on June 5, 1998, in an unpublished, summary order. (JA 614).

On November 9, 1998, this Court granted Lilly's petition for a writ of certiorari. *Lilly v. Virginia*, 119 S.Ct. 443 (1998). The questions presented for review were the issues he had presented to the Virginia Supreme Court in his petition for rehearing.

SUMMARY OF THE ARGUMENT

The petitioner's primary contention below was that Mark Lilly's confession was inadmissible as a matter of state law. He did not make his constitutional arguments upon which certiorari was granted in the Virginia Supreme Court until after that court had rendered its decision affirming his convictions. The petitioner's untimely presentation of the issues below should bar consideration of them now.

In any event, the state courts' decision that Mark Lilly's hearsay confession was sufficiently reliable to be admitted as a statement against penal interest did not violate the Confrontation Clause or constitute reversible error. Under *Ohio v. Roberts*, 408 U.S. 56, 66 (1980), hearsay does not offend the Confrontation Clause if it either fits within a firmly rooted exception or contains particularized guarantees of trustworthiness. Mark Lilly's hearsay confession satisfies both tests.

The exception for statements against penal interest is of ancient lineage and is accepted today by the overwhelming majority of the States. It thus is firmly rooted. Individual cases in which particular factual circumstances have led to the inadmissibility of an accomplice's hearsay statement do not detract from the widespread acceptance of evidence under the exception because it is based on the abiding principle that people do not lightly admit a crime unless the admission is true. *United States v. Harris*, 403 U.S. 573, 583-584 (1971).

In considering whether hearsay evidence meets this exception, moreover, a state court is not prohibited by the Confrontation Clause from requiring an additional showing of corroborating evidence. Such a requirement provides an added measure of trustworthiness for already reliable statements against penal interest. For this particular hearsay exception, such a requirement does not substitute the reliability of the collateral evidence for the reliability of the hearsay statement, and thus does not conflict with *Idaho v. Wright*, 497 U.S. 805 (1990).

The circumstances surrounding Mark Lilly's confession demonstrate its reliability: Mark never has been accused or even suspected by any one of committing the capital murder and he was told during the police interview that his accomplices had said he did not commit the murder; the police made no promises of leniency in return for his statement; he was given *Miranda* warnings; and he only reluctantly told the police what his brother had done. Mark had no motive to shift blame, curry favor or fabricate his account of what happened, particularly as to who was the person who murdered Alex DeFilippis.

Finally, considering all the evidence, including Gary Barker's detailed eyewitness testimony, the petitioner's inculpatory statements made at the scene of his arrest, the

petitioner's false statements made to the police, the evidence of blood on the petitioner's pants, his refusal to take the gunshot residue test, the fact that the petitioner had items from the Sander's break-in on his person at his arrest and the strong evidence from the robbery victims corroborating Mark's account, the admission of Mark's confession, even if error, was harmless beyond a reasonable doubt.

ARGUMENT

I. LILLY'S ARGUMENTS WERE NOT PRESENTED IN A TIMELY MANNER TO THE VIRGINIA SUPREME COURT.

Lilly presents three specific Confrontation Clause issues: (1) whether the Confrontation Clause absolutely prohibits the admission of the hearsay confession of an arrested criminal accomplice; (2) whether some sub-category of statements against penal interest – defined as Lilly's own case – is firmly rooted in the law; and (3) whether evidence that corroborates the hearsay confession can be considered when determining reliability. Lilly, however, did not make these arguments in the Virginia Supreme Court until after his case had been fully briefed, after it had been argued and after the Virginia Supreme Court had issued its decision. Only then did he squarely present the three arguments in a petition for rehearing.

A petition for rehearing, however, by definition presupposes that the matter contained in the petition has been "heard" in the first instance. *Moore v. Hilton*, 39 Va. 1, 25-26, 1841 Va. LEXIS 29, 44 (1841) ("a petition for rehearing is an application . . . not upon new matter or new evidence, but upon the matter in issue and the evidence in the cause at the former hearing"). Neither the Virginia Supreme Court nor the federal courts entertain

new arguments in petitions for rehearing. *See, e.g., Nicholas v. Nicholas*, 42 S.E. 669 (1902) (new arguments contained in untimely petition for rehearing refused); *Malady v. United States*, 120 F.3d 119, 120 (8th Cir. 1997); *United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996); *United States v. Klotz*, 503 F.2d 1056 (8th Cir. 1974); *Weigand v. Wingo*, 380 F.2d 1022, 1023 (6th Cir. 1967); *Carr v. F.T.C.*, 302 F.2d 688, 692 (1st Cir. 1962). Indeed, the Virginia Supreme Court denied Lilly's petition for rehearing in a summary order that expressed no view as to the merits. (JA 614). *See Yee v. Escondido*, 503 U.S. 519, 533 (1992) (a federal due process claim presented for the first time to California Supreme Court in a petition for discretionary review and rejected in a summary denial order "expressing no view as to the merits" not sufficiently presented to state court to allow certiorari review). Thus, unless it fairly can be said that Lilly presented his constitutional arguments to the Virginia Supreme Court in his opening and reply briefs, his certiorari arguments must be rejected because they were not "timely and properly raised" in the court below. *See* Sup.Ct. R. 14(1)(g)(i); *Yee*, 503 U.S. at 533; *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983) (the Court, with rare exception, has refused to consider claims not raised or addressed below).

A fair reading of Lilly's opening and reply briefs filed below reveals that his complaint centered around the Virginia hearsay rule and its exception, and around the Virginia Supreme Court's prior interpretation of the rule in criminal cases. His argument did not involve the federal Constitution except for the most peripheral, boilerplate notation of the constitutional amendment numbers in his argument headings and concluding sentences.[3]

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[3] The Virginia Supreme Court's opinion reflects this historical fact: "Lilly concedes that statements of a declarant

The Virginia Supreme Court decided that Mark Lilly's confession was sufficiently reliable under the Confrontation Clause to be admitted and that the hearsay exception for statements against penal interest is firmly rooted in Virginia. (JA 594). But Lilly did not raise, and the Virginia Supreme Court certainly did not decide as a matter of constitutional law, the issues Lilly has chosen to raise in this Court: whether the Confrontation Clause absolutely prohibits the admission of hearsay confessions; whether there exists some sub-category of statements against penal interest delineated by the facts of his case that is not firmly rooted; and whether a state court may consider corroborative evidence.

This Court's oft-repeated "[r]espect for the independence of state courts, as well as [its] avoidance of rendering advisory opinions" should bar Lilly's arguments. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (unless it fairly appears that state court decisions rested "primarily on federal law," Court is without jurisdiction to entertain federal claim); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state

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unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. . . . Lilly urges that *Chandler* was wrongly decided and should be overturned." (JA 592).

Moreover, the Virginia Supreme Court's description of Lilly's perfunctory constitutional complaint was entirely consistent with the short-shrift Lilly gave the Constitution in his briefs: "Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant." (JA 594). However, this conclusory claim in no way can be said to have put the Virginia Supreme Court on notice of Lilly's current arguments.

grounds."). Lilly did not timely raise his current grounds below. The Virginia Supreme Court certainly did not address them in its opinion. Therefore, they may not be considered now.[4]

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[4] To the extent the petitioner is claiming that Mark Lilly was not truly an "unavailable" witness, that claim also is barred from review now. (Pet. Br. 31-32: witness not unavailable by "simple" invocation of Fifth Amendment because prosecutor may collude with witness not to testify). No such claim ever has been made in this case and, indeed, the petitioner expressly conceded in the trial court that Mark Lilly was an unavailable witness. (JA 227). *See Newberry v. Commonwealth*, 61 S.E.2d at 326 (invocation of Fifth Amendment makes witness "unavailable"); *Lee*, 476 U.S. at 550 (Blackmun, J., dissenting) (same).

Furthermore, Lilly's derogatory reference to "the Commonwealth's tactics" (Pet. Br. 32) and the ACLU's similar charges that "all the cards are in the State's hands" because the prosecutor could try the declarant first, "strike a plea bargain" or "grant use immunity" (Br. for ACLU 28 n.47), never have been made before and have no basis in the record. If Lilly believed he was being prejudiced by the fact that he was being tried before Mark was tried, he could have brought that to the judge's attention and/or moved to continue the trial. Further, a "plea bargain" only could have been "struck" if Mark had been willing to testify against his brother, something he obviously was not willing to do. And, in Virginia, unlike the federal system, a witness cannot be forced to testify in derogation of his Fifth Amendment rights by an offer of immunity, except in certain narrow circumstances not applicable here. *Gosling v. Commonwealth*, 415 S.E.2d 870, 873 (Va. App. 1992); Va. Code §§ 18.2-262, 18.2-437. In this case, all the cards were in ***the petitioner's*** hands: he and his family decided whether Mark would testify, when he would testify and what he would say. In Virginia, it is far more likely that ***the defendant*** will collude with his co-defendants regarding their testimony than will the ***prosecutor***.

II. STATEMENTS AGAINST PENAL INTEREST SATISFY THE CONFRONTATION CLAUSE BECAUSE THEY FALL WITHIN A FIRMLY ROOTED EXCEPTION TO THE HEARSAY RULE.

Lilly dismisses this issue by assuming that this Court already has decided it in his favor. He relegates to a footnote an historically incomplete – and inaccurate – analysis of the lineage of the hearsay exception. (Pet. Br. 32 n.15). He then avoids the issue entirely by asserting that it matters not whether the "general" exception is firmly rooted in the law because the "subcategory" exception not only is not firmly rooted, but already has been pronounced to be so by this Court. (Pet. Br. 34). Not surprisingly, the petitioner conveniently defines the "subcategory" exception by the facts of his own case.

By defining away the problem, however, Lilly avoids any principled analysis of the issue, that, when properly undertaken, leads to two inescapable conclusions: (1) the exception for statements against penal interest is firmly rooted and of ancient lineage; and (2) the sound premise underlying the exception involves immutable, basic human behavior that is applicable to ***all*** such statements regardless of the factual context or particular case in which they are made.

A. The Standard

The Confrontation Clause allows the admission of those out-of-court statements which have sufficient "indicia of reliability" to justify dispensing with face-to-face confrontation and cross-examination of the declarant. *Roberts*, 448 U.S. at 65. Reliability, however, can be inferred without more in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded absent a showing

that the statement in question carries particularized guarantees of trustworthiness. *Id.* at 66; *White*, 502 U.S. at 354; *Wright*, 497 U.S. at 814-815.

This Court has held that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 497 U.S. at 817. Additionally, the hearsay rules and the Confrontation Clause "are generally designed to protect similar values," and "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " *Roberts*, 448 U.S. at 66. Of course, admitting evidence pursuant to a firmly rooted hearsay exception also "responds to the need for certainty in the workaday world of conducting criminal trials." *Id.*; *see also Mattox v. United States*, 156 U.S. 237, 243 (1895) ("[the right of confrontation], however beneficent in [its] operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.").

Indeed, the Confrontation Clause's primary concern is accuracy. *See United States v. Inadi*, 475 U.S. 387, 396 (1986) (the "Confrontation Clause's very mission . . . is to advance the accuracy of the truth-determining process in criminal trials"), *quoting Dutton*, 400 U.S. at 89 (internal quotation marks omitted). And there is no principled or logical way to argue that accuracy should not apply equally to all evidence, whether offered by the defendant or the prosecution. *See Snyder v. Massachusetts*, 291 U.S.

97, 122 (1934) (justice due equally to accused and accuser).

Lilly simply is wrong when he argues that the exception for statements against penal interest is "of extremely recent vintage" or, for that matter, that an exception of recent vintage cannot qualify for firmly rooted status. (Pet. Br. 32 n.15). It is true that if a hearsay exception reflects a long-standing tradition and is widely accepted in current law, it qualifies as a firmly rooted exception for purposes of the Confrontation Clause. *See, e.g., White*, 502 U.S. at 356 n.8 (state hearsay exception for spontaneous declarations firmly rooted because "at least two centuries old" and "currently recognized under the Federal Rules of Evidence, Rule 803(2), and in nearly four-fifths of the States"); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (hearsay exception, Fed. R. Evid. 801(d)(2)(E) for declarations of a co-conspirator is firmly rooted because "steeped in our jurisprudence" and because such statements "have a long tradition of being outside the compass of the general hearsay exclusions").

The category of firmly rooted exceptions, however, is not limited to rules of evidence with a long history. "True to the common-law tradition, the process [of accommodating competing interests under the Confrontation Clause] has been gradual, building on past decisions, drawing on new experiences, and responding to changing conditions." *Roberts*, 448 U.S. at 64. Hearsay exceptions may be firmly rooted because of their widespread modern acceptance, without reference to how long ago the exception first was recognized. *See White*, 502 U.S. at 356 n.8 (exception for statements made for purposes of medical diagnosis or treatment firmly rooted because recognized in federal rules of evidence and widely accepted by

States); *Wright*, 497 U.S. at 817 (statements within "established hearsay exceptions possess the imprimatur of judicial and legislative experience") (internal quotation marks omitted).

B. Current Acceptance

There can be no question today but that the hearsay exception for statements against penal interest qualifies for firmly rooted status. It is ensconced in the Federal Rules of Evidence which this Court submitted to Congress and Congress enacted into law. *See* Fed. R. Evid. 804(b)(3) (1975). It is an exception that has been adopted by almost all States and the District of Columbia, either by statute, rule or court decision.[5] Although a small

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[5] 5 J. Wigmore, Evidence § 1477, pp. 360-362 n.7 (Chadbourn rev. 1974) and 1998 Supp. at pp. 620-626; *see* Ala. R. Evid. 804(b)(3) (1995); Alaska R. Evid. 804(b)(3) (1979); Ariz. R. Evid. 804(b)(3) (1977); *People v. Gordon*, 792 P.2d 251, 265-269 (Cal. 1990), *cert. denied*, 499 U.S. 913 (1991); Colo. R. Evid. 804(b)(3) (1979); Del. Unif. R. Evid. 804(b)(3) (1980); *Laumer v. United States*, 409 A.2d 190, 192 (D.C. 1979); Fla. Stat. Ann. § 90.804(2)(c) (Harrison Supp. 1990); Hawaii R. Evid. 804(b)(3)(1980); Idaho R. Evid. 804(b)(3) (1985); *People v. Carson*, 606 N.E.2d 363, 366 (Ill. App. 1992); Iowa R. Evid. 804(b)(3) (1983); Ky. R. Evid. 804(B)(3) (1992); La. Code of Evid. art. 804(B)(3) (1988); Md. R. Evid. 5-804(b)(3) (1994); *Commonwealth v. Carr*, 369 N.E.2d 970, 974 (Mass. 1977); Mich. R. Evid. 804(b)(3) (1978); Minn. R. Evid. 804(b)(3) (1977); Mont. R. Evid. 804(b)(3) (1976); Neb. Rev. Stat. § 27-804(2)(c) (1979); N.H. R. Evid. 804(b)(3) (1985); N.M. R. Evid. 804(b)(4) (1973); N.C. R. Evid. 804(b)(3) (1983); Ohio Evid. R. 804(b)(3) (1980); *State v. Gilliam*, 635 N.E.2d 1242, 1245 (Ohio 1994); Okla. Stat. Ann. tit. 12, § 2804 (1980); Or. Evid. Code § 40-465(3)(c) (1988); R.I. R. Evid. 804(b)(3) (1987); *State v. Doctor*, 413 S.E.2d 36, 37 (S.C. 1992); Tenn. R. Evid. 804(b)(3) (1990); Tex. R. Crim. Evid. 803(24) (1986); Utah. R. Evid. 804(b)(3) (1992); *Hines*, 117 S.E. at 849;

minority of seven States has adopted formal rules which expressly exclude the statements of an accomplice implicating a defendant (Pet. Br. 35), the overwhelming majority view permits the admission of evidence under this exception without restriction.

Most of the federal courts of appeals which have considered the issue have held that the hearsay exception is firmly rooted. *See United States v. Trenkler*, 61 F.3d 45, 62 (1st Cir. 1995); *United States v. Katsougrakis*, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)[6]; *United States v. York*, 933 F.2d 1343, 1363 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991); *United States v. Keltner*, 147 F.3d 662, 671 (8th Cir.), *cert. denied*, 119 S.Ct. 574 (1998); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991).[7]

Wash. R. Evid. 804(b)(3) (1978); W.Va. R. Evid. 804(b)(3) (1985); Wis. R. Evid. 908.045(4) (1974); Wyo. R. Evid. 804(b)(3) (1977).

[6] The Second Circuit, without overruling *Katsougrakis*, acknowledged in a subsequent case that it had "previously held that the penal interest exception is firmly rooted," but noted that "[s]ome recent cases cast some doubt on this conclusion, . . . and the Supreme Court has not addressed the question." *United States v. Bakhtiar*, 994 F.2d 970, 977-978 (2d Cir.), *cert. denied*, 510 U.S. 994 (1993).

[7] The petitioner says that four circuits have decided that the hearsay exception is not firmly rooted. (Pet. Br. 34). Three of the cases he relies on, however, do no more than rely on the same language from the footnote in *Lee*, 476 U.S. at 544 n.5. *See Earnest v. Dorsey*, 87 F.3d 1123, 1131 (10th Cir.), *cert. denied*, 519 U.S. 1016 (1996); *United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993); *Morrison v. Duckworth*, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991). For the reasons set forth below in Argument II(D), the reliance on footnote five in *Lee* for precedent is unfounded. Obviously, if this Court already had decided the issue in *Lee*, it would not merely have granted certiorari in Lilly's case, but would have summarily reversed. In *Morrison*, moreover, the Seventh Circuit made no mention of its prior decision in *York*, 933 F.2d at 1363, wherein it had found the hearsay exception firmly rooted. And the fourth case, *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982), implicitly was overruled by the Eighth Circuit in *Keltner*, 147 F.3d at 671. A review of the four cases cited by Lilly thus leads to the inevitable conclusion that no circuit has ruled authoritatively that the hearsay exception is not firmly rooted.

C. Historical Acceptance

Of course, in order to qualify as firmly rooted, a hearsay exception need not be ancient; it may qualify solely on the basis of its widespread acceptance in contemporary law. *See White*, 502 U.S. at 356 n.8. The exception for declarations against interest, however, is of undeniably ancient lineage.

Courts in England began to admit statements against a declarant's interest "shortly after the hearsay rule was established" in the 1700's. 5 J. Wigmore § 1476 at 350. Some time before the beginning of the nineteenth century, English courts began recognizing a "unity of principle" that allowed into evidence any statement that concerned matters prejudicial to the declarant's self-interest, regardless of whether they were pecuniary or penal. *Id.*

In 1844, however, the House of Lords decided the *Sussex Peerage Case*, 11 Cl. & F. 85, 110 (1844), in which

> a backward step was taken and an arbitrary limit put upon the rule. It was held to exclude the statement of a fact subjecting the declarant to a criminal liability, and to be confined to statements of facts against either pecuniary or proprietary interest. Thence forward this rule was accepted in England, although it was plainly a novelty at the time of its inception; for in several rulings up to that time statements of criminal facts had been received.

5 J. Wigmore § 1476 at 351 (footnote omitted).

Although contrary to previous interpretations of the rule, the *Sussex Peerage Case* was accepted in England and the United States in the second half of the nineteenth century. Commentators "almost universally" condemned the distinction drawn between statements against penal interest and the other kinds of statements against interest. *See* Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 B.U.L. Rev. 148, 152 (1976); Comment, 1 Cal. L. Rev. 475, 476 (1913); Comment, 9 Cornell L. Q. 57, 59 (1924); Recent Case, 37 Harv. L. Rev. 156, 156-157 (1924); Comment, 10 Va. L. Rev. 83, 84 (1924); Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 40 (1944); Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451, 463 (1952); 2 McCormick on Evidence § 318 at 340 (J. Strong ed., 4th ed. 1992).

In fact, courts "demonstrated striking ingenuity" in discovering ways to bring statements against penal interest within the exception for statements against pecuniary or proprietary interest. Fed. R. Evid. 804 Advisory Committee Note, 28 U.S.C. App. at 789; *see, e.g.*, Jefferson, 58 Harv. L. Rev. at 40 & nn.94-96; Morgan, 5 Vand. L. Rev. at 474-475; *Aetna Life Ins. Co. v. Strauch*, 67 P.2d 452, 455 (Okla. 1937) (admitting declarant's confession to murder on ground it would have prevented him from recovering insurance on victim), *overruled, Howard v. Jessup*, 519 P.2d 913, 917 (Okla. 1973) (recognizing hearsay exception for statements against penal interest); *Weber v. Chicago, R.I. & P.Ry.*, 151 N.W. 852, 864 (Iowa 1915) (declarations were "against [the declarant's] pecuniary interest, for they were of such a nature as to constitute the basis of an action against him for damages as well as exposing him to criminal prosecution").

Then, in *Donnelly v. United States*, 228 U.S. 243 (1913), this Court followed the then-prevailing rule and held that the federal hearsay exception did not extend to statements against penal interest. *Id.* at 272-277. Justice Holmes' eloquent dissent, however, highlighted the wrong-headedness of the majority's holding, enunciated the common sense approach that had been derailed by the ill-reasoned English case seventy years prior and set in motion the quick correction that would take place in American courts in the following years:

> The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, (*Mattox v. United States*, 146 U.S. 140); and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact

that, if proved, commonly would have such weight.

Donnelly, 228 U.S. at 277 (Holmes, J., dissenting).

Following Justice Holmes' reasoning, several States recognized hearsay exceptions for statements against penal interest. Among those States was Virginia that, in 1923, adopted Justice Holmes' reasoning in what Wigmore termed a "masterly opinion." 5 J. Wigmore § 1477 at 359 n.3; *see Hines*, 117 S.E. at 849. By 1976, twenty-one States had decided to allow statements against penal interest. *See* Note, 56 B.U.L. Rev. at 149 n.5.

By the time the Federal Rules of Evidence were being proposed and adopted, this Court already had begun to retreat from the ruling in *Donnelly*. *See Dutton*, 400 U.S. at 76-81 (allowing admission of post-conspiracy statement of co-conspirator under Georgia hearsay exception; noting existence of sufficient "indicia of reliability" to satisfy the Confrontation Clause because statement "was spontaneous, and ***it was against [the declarant's] penal interest to make it***") (emphasis added); *id.* at 89 (statement against penal interest is indicator of reliability "widely viewed as determinative of whether [it] may be placed before the jury"); *Harris*, 403 U.S. at 583-584 (noting that *Donnelly* "has been widely criticized . . . and has been partially rejected in Rule 804 of the Proposed Rules of evidence")[8]; *United States v. Matlock*, 415 U.S. 164, 176

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[8] The plurality added:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. ***Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility*** – sufficient at least to support a finding of probable cause to search. ***That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.***
>
> *Harris*, 403 U.S. at 583-584 (emphasis added).

(1974) (declarant's out-of-court statements "were against her penal interest and they carried their own indicia of reliability"); *see also Lee*, 476 U.S. at 551 (Blackmun, J., dissenting) ("the hearsay exception for declarations against [penal] interest is firmly established.").[9]

Indeed, the petitioner does not dispute the fact that the other branch of the hearsay exception for statements against interest – statements against pecuniary and proprietary interest – is a firmly rooted exception. That being so, however, it is difficult to justify why the result should

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[9] *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 391 U.S. 123 (1968), are not to the contrary. In *Douglas*, the ***only*** direct evidence against the defendant was the hearsay evidence of the accomplice, *see California v. Green*, 399 U.S. 149, 187 n.20 (1970) (Harlan, J., concurring); more importantly, *Douglas* "was a case of prosecutorial misconduct," *id.*, wherein the prosecutor improperly read the accomplice's statement to the jury under the guise of refreshing the witness' recollection after the witness had refused to testify under the Fifth Amendment. *See Douglas*, 380 U.S. at 419. In *Bruton*, where two co-defendants were jointly tried, the government conceded that the confession of the co-defendant was inadmissible against Bruton and the only question in the case was whether the jury was able to follow the trial court's instruction to disregard that confession as to Bruton. *See Bruton*, 391 U.S. at 137. The holdings in these cases do not foreclose the conclusion that statements against penal interest may be admitted under the exception to the hearsay rule. *See, e.g.*, Fed. R. Evid. 804 Advisory Committee Note, 28 U.S.C. App. at 790; *Lee*, 476 U.S. at 552 n.5 (Blackmun, J., dissenting); *Cruz v. New York*, 481 U.S. 186, 192-193 (1987).

be different in the case of the "penal interest" branch of the exception. The central requirement of both branches is the same – that the statement must be sufficiently against the declarant's interest that he would not have made it if he did not believe that it was true. That inquiry is exactly the same for one kind of statement against interest as it is for another. The only significant difference between the two branches, for purposes of determining how "firmly rooted" they are, is that two sharply criticized decisions from 150 and 80 years ago refused to recognize statements against penal interest as falling within the scope of the exception. Under these circumstances, it simply does not make sense to treat one branch of the "statements-against-interest" exception as firmly rooted and the other branch not.

D. *Lee v. Illinois*

The petitioner's brief is permeated with the argument that in *Lee v. Illinois*, this Court held that the hearsay exception for declarations against penal interest is not firmly rooted. The Court in *Lee*, however, merely observed in a footnote:

> We reject [the State's] categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis.

476 U.S. at 544 n.5. This footnote obviously did not represent the holding of the Court on the question presented in Lilly's case because, eight years later in *Williamson*, 512 U.S. at 605, a majority of the Court held, "we need not decide whether the hearsay exception for declarations against interest is 'firmly rooted' for Confrontation Clause purposes." This holding made no reference to the footnote in *Lee*, but yet referenced *Lee* for the observation

that "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Williamson*, 512 U.S. at 605, *citing Lee*, 476 U.S. at 543-45.

Thus, footnote five in *Lee* must be limited by the factual context of the evidence the Court there rejected. Significantly, the veracity, *i.e.*, reliability, of the declarant's statements in *Lee* was very much in doubt. This Court noted that the declarant Thomas initially refused to talk to the police and did so only after being told that Lee had implicated him and after Lee had "implored" him to share "the rap." *Lee*, 476 U.S. at 544. This motive to "distort the facts to Lee's detriment" was further demonstrated by the fact that "Thomas contemplated becoming a witness for the State against Lee." *Id.* As a likely fabrication, therefore, Thomas' statement was not a true declaration against his penal interest. Thus, to label Thomas' dubious, blame-shifting statement as one falling within the narrow hearsay exception simply "defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5. This footnote, however, simply cannot be taken as an authoritative holding that statements which actually satisfy the requirements of the exception nonetheless must be excluded under the Confrontation Clause.

E. Lilly's "Sub-Category"

Lilly's "sub-category" argument proves too much. According to him, even if the exception for statements against penal interest generally is firmly rooted, there exists a rootless "sub-category:" "custodial statements by an accomplice or codefendant which implicate a criminal

defendant."[10] (Pet. Br. 33). The petitioner's theory, however, rests almost exclusively upon the language in *Lee* that "a codefendant's confession inculpating the accused is inherently unreliable." *Lee*, 476 U.S. at 546. Indeed, the few cases he cites which have held that the exception is not firmly rooted for custodial accomplice confessions typically rely on this same language from *Lee*. *See, e.g., Earnest*, 87 F.3d at 1131; *Flores*, 985 F.2d at 776 n.13; *Morrison*, 929 F.2d at 1181 n.2; *State v. Hughes*, 510 N.W.2d 33, 38 (Neb. 1993), *cert. denied*, 512 U.S. 1235 (1994); *People v. Watkins*, 475 N.W.2d 727, 741 (Mich. 1991), *cert. denied*, 502 U.S. 1057 (1992).

As already demonstrated, however, the holding in *Lee* was driven by its facts, as were, no doubt, the holdings in the cases cited by the petitioner. Indeed, the declarant's statements in *Lee* would not have qualified for admission under Virginia's hearsay exception because, under the facts of that case, the prosecution could not have demonstrated that the declarant genuinely believed he was making admissions contrary to his penal interest as opposed to simply fabricating information to avoid being held criminally responsible. Such hearsay statements likely would not have satisfied Federal Rule 804(b)(3) for the same reason.

Lee's particular facts, which showed the statements to be unreliable in that case, cannot render an entire hearsay exception unreliable or off-limits to the prosecution. To be sure, the "against penal interest" exception is firmly rooted and generally accepted, but that does not mean

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[10] Under the petitioner's theory, he would be unable to admit into evidence a confession from a co-defendant that ***exonerated*** him simply because it was given in a post-arrest, custodial setting. He cannot logically argue that such a confession is reliable in one case but not reliable in another, depending on who is offering it into evidence.

that in every case, or even in a particular case such as Lilly's, the evidence comes in automatically simply because the prosecution proffers it.[11] The hearsay must meet the requirements of the exception, regardless of the exception's "firmly rooted" status.[12]

If, in a particular case, the factors emphasized by the petitioner are present, *i.e.*, blame-shifting, currying favor, motives of retribution, promises of leniency, etc., such that the trial court believes the hearsay does not demonstrate the declarant's subjective belief that he is making a detrimental penal admission, then the hearsay simply ***will not qualify as a statement against penal interest***. It is the inherent nature of the exception itself that imparts its reliability and trustworthiness to the evidence and

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[11] In this case, the trial court had before it a written motion to exclude the evidence (JA 7) as well as the transcripts of Mark Lilly's interviews. The court heard argument on the motion during the trial, out of the presence of the jury, on October 23, 1996. (JA 9). At the conclusion of the hearing, the defense complained that they had not yet listened to the two audio taped recordings of the interviews with Mark. (JA 236). The court allowed the defense time to listen to the taped recordings, noted for the record that they had reviewed the tapes for an hour and fifteen minutes (R. 799) and then admitted them into evidence. (JA 239, Comm.'s Exhibits 49 and 50). The jury heard the two taped recordings and followed along with written transcripts.

[12] Lilly's assertion – that a confession found insufficiently reliable to qualify under the hearsay exception also must fail under the Confrontation Clause (Pet. Br. 29) – fails to recognize that a confession that does not meet the State's hearsay exception will not be admitted into evidence and the constitutional issue never will be reached. Lilly's assertion only underscores the fact that his "Confrontation Clause" claim is nothing more than a mere disagreement with the state court's ruling and belies his distrust of the state court's ability to decide the evidentiary issue in a constitutional manner.

that has made it an integral part of our judicial system for hundreds of years:

> It is against self-interest to admit one's own criminal liability . . . and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of admissions, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 512 (1991); *see also* 5 J. Wigmore, § 1457 at 329 (exception founded on "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect . . . ").

Lee must be understood as a case in which the particular facts demonstrated that the hearsay could not qualify as a statement against penal interest. Nothing in *Lee*, or any other case from this Court, has carved out a "subcategory" deserving of less acceptance than the "general" category of statements against interest. The exception's foundation is the same for all such hearsay statements and its continuing validity is illustrated by its overwhelming acceptance in both state and federal courts.

III. THE CONFRONTATION CLAUSE DOES NOT PROHIBIT A STATE COURT FROM REQUIRING PROOF OF CORROBORATING EVIDENCE BEFORE ADMITTING HEARSAY UNDER THE EXCEPTION FOR STATEMENTS AGAINST PENAL INTEREST.

Lilly argues that the state courts were prohibited under *Idaho v. Wright* from considering evidence corroborating Mark Lilly's confession. He contends that *Wright* authoritatively decided the issue in 1990 but that, to the

extent it did not, it should be extended to cover his case. Lilly is wrong on both counts.

In *Wright*, a two-year-old child's reports of sexual abuse to her doctor were admitted under Idaho's "residual hearsay exception." 497 U.S. at 817.[13] This Court held that the child's statements were presumptively unreliable and rejected the State's argument that evidence corroborating the child's statements made them reliable. *Id.* at 819.[14] Thus, *Wright* expressly prohibited consideration of corroborating evidence in cases where the government seeks to admit hearsay under a "residual" exception.

However, *Wright* did not expressly, or otherwise, prohibit consideration of corroborating evidence in cases involving statements against penal interest. Indeed, four years after *Wright* was decided, this Court specifically stated in an opinion again authored by Justice O'Connor

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[13] "The residual hearsay exception . . . accommodates *ad hoc* instances in which statements not otherwise falling within a recognized . . . exception might nevertheless be sufficiently reliable to be admissible at trial." *Wright*, 497 U.S. at 817. Virginia law recognizes no such exception for hearsay.

[14] The Court's opinion, authored by Justice O'Connor and joined by Justices Brennan, Marshall, Stevens and Scalia, held that the reliability determination required an assessment of the totality of the circumstances surrounding the making of the hearsay statement, but "not by reference to other evidence at trial." 497 U.S. at 822. Justice Kennedy, in a dissent joined by Chief Justice Rehnquist and Justices White and Blackmun, believed that "corroboration has been an essential element in our past hearsay cases, and there is no justification for a categorical refusal to consider it here." *Id.* at 832. Justice Kennedy explained that the "no corroboration" rule was a new creation, would prove unworkable and was contrary to precedent. *Id.* at 828. The dissent found it "a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence." *Id.*

that it "need not decide whether, as some Courts of Appeals have held . . . [Rule 804(b)(3)] requires that statements inculpating the accused be supported by corroborating circumstances." *Williamson*, 512 U.S. at 605.

Moreover, *Wright*'s "no corroboration" rule should not be extended to the exception for statements against penal interest because to do so would ***curtail***, rather than enhance, the protections afforded to defendants like Lilly. Evidence properly admitted under the exception for statements against penal interest is itself inherently reliable: the very premise of admitting such evidence is that no reasonable person would make such a statement unless he believed it to be true. *See, e.g., Masson*, 501 U.S. at 512; *Harris*, 403 U.S. at 583-584. The exception itself requires that the statement be made under circumstances that ensure its reliability. Thus, the Confrontation Clause is satisfied if the exception is properly applied to any statement found to be genuinely against the declarant's penal interest.

Virginia's requirement that this innately reliable evidence also must be accompanied by an added assurance of reliability in the form of independent corroboration – "anything substantial other than the bare confession to connect the declarant with the crime," *see Hines*, 117 S.E. at 840 – can only ***benefit*** the defendant against whom the evidence is offered. A prosecutor in Virginia not only must satisfy the ancient common law rule requiring a genuine statement against penal interest, but also must demonstrate other "substantial" circumstances corroborating the truth of the hearsay statement.[15] In other

[15] Lilly says that corroborative evidence should not be allowed because, in effect, such evidence can be ***manufactured*** by the police at the behest of a prosecutor who has arranged for the declarant to be unavailable at trial. (Pet. Br. 40 n.20). Lilly's grand conspiracy theory, however, has no basis in the record of his case or, for that matter, in real life. The police interviews with Mark Lilly, occurring shortly after the crimes had been committed, demonstrate that there was no "co-authoring" of corroborative evidence. (JA 244-274, 298-321). Throughout the interviews, the police simply asked Mark what had happened. His statements were corroborated in great detail not only by Gary Barker's independent eyewitness testimony, but also by the eyewitness testimonies of the victims of the two robberies occurring after the murder and by the testimony of Danny Sanders identifying the items stolen from his house before the murder, some of which were found on the petitioner's person upon his arrest. (JA 87). On all material points, Mark Lilly's account of what happened was verified by information that was not provided to Mark by the police or the prosecutor. Petitioner's insinuation that the authorities would orchestrate not only Mark's confession but also ***his unavailability at trial,*** displays a bias against, and distrust of, state officials that is contrary to the record and the law.

words, with respect to the exception for statements against penal interest, the corroborating evidence requirement ***augments*** the reliability of the hearsay; it does not ***replace*** it or "bootstrap" onto it, as is the case when dealing with something as amorphous as the "residual" hearsay exception.[16]

[16] As this Court recognized in *Williamson*, there is a split among the federal courts over the issue of whether Rule 804(b)(3) ***"requires"*** the government to demonstrate something more than just the bare statement against penal interest. 512 U.S. at 605. The debate is whether the federal government is ***required*** to provide defendants with the added protection that Virginia has required for decades. *See Bourjaily*, 483 U.S. at 180-181 (for co-conspirator exception, courts may, but need not, look to corroborating evidence); *id.* at 184 (Stevens, J., concurring) (some corroborating evidence should be required); *id.* at 186 (Blackmun, J., dissenting) (reliability must be established by corroborating evidence).

IV. THE STATE COURTS DID NOT ERR IN DETERMINING THAT MARK LILLY'S CONFESSION WAS ADMISSIBLE.

A. The Issue Is A Fact-Intensive Matter Best Left To The Lower Courts.

The petitioner's argument that accomplice confessions never should be allowed into evidence is based upon a faulty premise that confessions given during custodial questioning must all be unreliable. (Pet. Br. 44 n.23).[17] This Court has made clear, however, that "confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Williamson*, 512 U.S. at 603; *see also Lee*, 476 U.S. at 552 (Blackmun, J., dissenting) ("Never . . . has the Court held such confessions *per se* inadmissible. . . . ").

Moreover, in a case such as this, where the confession was made after *Miranda* warnings had been given, Lilly's "false confession" theory is directly contrary to this Court's long-standing precedent. *See Withrow v. Williams*, 507 U.S. 680, 692 (1993) ("By bracing against the 'possibility of unreliable statements in every instance of in custody interrogation,' *Miranda* serves to guard against 'the use of unreliable statements at trial' "), *quoting Johnson v. New Jersey*, 384 U.S. 719, 730 (1966). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973) (*Miranda* "Court made it clear that the basis for decision was the need to protect the fairness of the trial itself"); *Williamson*, 512 U.S. at 620 (Kennedy, J., concurring) (statement should come in if no promises of leniency and declarant

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[17] Taken to its logical conclusion, Lilly's thesis would bar *all* confessions, including defendants' own custodial confessions which currently are admitted routinely under the hearsay exception for party admissions.

given *Miranda* warnings); *United States v. Garcia*, 897 F.2d 1413, 1421 (7th Cir. 1990).

The real question presented by this case, then, is who should decide whether a particular piece of hearsay evidence offered against a criminal defendant constitutionally may be admitted for consideration as proof of his guilt. With respect to hearsay evidence under the exception for statements against penal interest, this Court properly has observed, both expressly and, no doubt by virtue of its own experience, that "this can be a fact-intensive inquiry." *Williamson*, 512 U.S. at 604; *id.* at 621 (Kennedy, J., concurring) (decision "will require a difficult, factbound determination."); *see also Green*, 399 U.S. at 169-170. Lower federal courts recognize this principle by their application of a "clearly erroneous" standard of review to a "finding of the trial judge on the guarantees of trustworthiness" of hearsay. *United States v. Workman*, 860 F.2d 140, 144 (4th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *see also Williamson*, 512 U.S. at 621 (Kennedy, J., concurring) ("District judges, who are close to the facts and far better able to evaluate the various circumstances than an appellate court, therefore must be given wide discretion to examine a particular statement. . . . ").[18]

This Court simply does not sit to review or redetermine facts because the trial courts are better suited to make these determinations. *See* Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Kyles v. Whitley*, 514 U.S. 419, 458 (1995) (Scalia, J., dissenting). Indeed, in the final analysis, the question of whether a confession is sufficiently reliable to be admitted should be left to the

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[18] The Virginia Supreme Court employs a similar standard of review: a reliability determination lies within "the sound discretion of the trial court, to be determined upon the facts and circumstances of each case." *Ellison*, 247 S.E.2d at 688.

lower courts because it is no different than the many other fact-bound questions faced on a daily basis by trial judges: is a particular juror impartial? is a confession voluntary? is a guilty plea voluntary? is a prior identification overly suggestive? is exculpatory evidence material? was trial counsel's performance ineffective? *See Bourjaily*, 483 U.S. at 181 ("As we have held in other cases concerning admissibility determinations, 'the judge should receive the evidence and give it such weight as his judgment and experience counsel.' ") (*quoting Matlock*, 415 U.S. at 175).

Indeed, it is the States which are the primary enforcers of the criminal law, *see Patterson v. New York*, 432 U.S. 197, 201 (1977), and their rules governing criminal trials generally should be left undisturbed by the federal courts. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995). A case-by-case examination of the reliability of each hearsay statement not only is an unworkable endeavor for this Court, but would undermine the States' "strong interest in effective law enforcement, and in the development and precise formulation of rules of evidence." *See Roberts*, 448 U.S. at 64.[19]

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[19] The ACLU proposes that all confessions of a co-defendant be held *per se* inadmissible. (Br. for ACLU at 20). This thesis is based upon the ACLU's view that the reliability test vests too much discretion in the lower courts. (*Id.* at 19). This Court should reject the ACLU's proposal. The lower courts, including the state courts which handle the majority of criminal cases, certainly are as well qualified as this Court to make evidentiary rulings in accordance with the Constitution. *See Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (rejecting argument that State will follow Constitution only if forced to: "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.").

B. The Confession Was Reliable.

The circumstances surrounding Mark Lilly's confession do not support the conclusion that the two lower state courts erred in finding the confession reliable. Despite Lilly's repetitive references to Mark's confession as "blame-shifting," there is absolutely no evidence in this case that Mark ever "shifted" blame.

Indeed, if there is one overriding factor in this case, it is that ***no one, including the petitioner, ever has alleged that Mark Lilly was the shooter or that Mark in any manner was more culpable than his own confession depicted***. *See Lee*, 476 U.S. at 553 (Blackmun, J., dissenting) ("there is no claim by either side that [the declarant] actually was more culpable than either he or petitioner admitted."). Additionally, it is highly significant that, during the police interviews, the police not only did not induce Mark to confess by telling him that the others had blamed him, *compare Lee*, 476 U.S. at 544, but the police actually told Mark that ***the others "said you didn't do it."*** (JA 257). In other words, Mark's confession did not, and indeed could not, "shift" blame, because Mark never was blamed to begin with, and never even was in jeopardy of being blamed.[20]

Unlike the declarant in *Lee*, Mark was not "actively considering the possibility of becoming [the petitioner's] adversary" by testifying against his brother. *See Lee*, 476 U.S. at 544. To the contrary, Mark refused to testify

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[20] The mere fact that Mark implicated the petitioner in a more serious crime than himself says nothing about the truthfulness of the confession unless Mark himself was implicated in the more serious crime and had a motive to falsely incriminate his brother. Not only has Mark never been implicated, but the petitioner himself implored Mark at the arrest site to turn himself in because he was "not the one that's really done anything wrong." (JA 216).

against his brother (JA 238) and, in fact, testified ***in his brother's behalf*** at the post-verdict hearing (JA 397-400, R. 1615-1619). Thus, unlike the fabricated confession in *Lee*, Mark clearly did not implicate the petitioner out of any motive of retribution or "blame-shifting."

Moreover, contrary to the petitioner's contention, Mark's statements regarding the petitioner's actions were inculpatory as to Mark.[21] Mark's account of the crimes admitted that: all three men broke into Danny Sanders' house and stole the guns, liquor, etc.; Mark and Gary aided and abetted the petitioner's abduction and murder of DeFillipis by, at the very least, consenting, aiding and lending countenance, not to mention assisting in the getaway; all three men robbed the owners of the first market; and Mark and Gary robbed the owners of the second market.[22] Mark's description of his brother's commission

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[21] In Virginia, a principal in the second degree is tried, convicted and punished as if a principal in the first degree, except for the crime of capital murder; a principal in the second degree to capital murder is tried and punished for first degree murder, carrying a maximum sentence of life in prison. Va. Code § 18.2-18. A principal in the first degree is the actual perpetrator of the crime; a principal in the second degree is one who is "encouraging, inciting, or in some manner offering aid or consent to the crime [and] [a]ll persons present lending countenance or otherwise aiding. . . . " *Horton v. Commonwealth*, 38 S.E. 184, 185 (Va. 1901). "All those who assemble . . . together with an intent to commit a wrongful act" are equally responsible for incidental crimes not specifically planned. *Brown v. Commonwealth*, 107 S.E. 809, 811 (Va. 1921).

[22] Virginia follows the common law rule of allowing in the declarant's entire statement containing declarations against penal interest if the entire statement is found to be reliable. *Chandler*, 455 S.E.2d at 224-225. *See Williamson*, 512 U.S. at 615 (Kennedy, J., concurring) ("From the very beginning of this exception, it has been held that a declaration against interest is

of abduction and murder was the basis upon which he himself became liable – and was convicted subsequently – of abduction and first-degree murder.[23]

Furthermore, Mark's statements were reliable because he was not promised any form of leniency in return for his statements. In fact, Mark stated during the interviews that he knew he would be going to prison for murder and robbery. (JA 307). Of course, his statements also were reliable because he was told he had the right to remain silent and that any statements he made could be used against him.[24] *See Williamson*, 512 U.S. at 620 (Kennedy, J., concurring); *Garcia*, 897 F.2d at 1421.

Indeed, the entire tenor of Mark's statements to the police was one of a reluctant brother who was constrained to tell the truth. Mark repeatedly expressed discomfort with having to reveal his brother's part. (JA 257: "Well, it's kinda hard cause he's my fucking brother, man"; JA 307: "Yeah. Yeah, man, something else, too. I'm

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admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.") (quoting Jefferson, 58 Harv.L.Rev. 1, 57 (1944)). *Williamson*'s ruling that the federal hearsay rule does not allow collateral statements does not affect Virginia's rule because *Williamson*'s holding was not constitutionally based and, indeed, the majority opinion noted that Congress could make collateral statements admissible. 512 U.S. at 600.

[23] The NACDL disingenuously implies that Mark's statements somehow made him eligible for release on parole. (Br. for NACDL at 3). Mark's multiple crimes of robbery and murder, however, rendered him ineligible for parole under Virginia Code § 53.1-151(B1).

[24] The voluntariness of Mark's statements never has been questioned, although the petitioner certainly would have been free to challenge the admissibility of the statements on that basis at trial.

going to be getting all these charges and that's my brother I'm telling on."). Significantly, Mark refused to go along with the officer's attempts to get him to repeat what his brother had said before or after the shooting or what DeFillipis had said in the car. (JA 255, 260, 310, 314-315). Such reluctance hardly indicated that Mark was fabricating a story against his brother.

Mark's statements were different in kind from those in *Lee* where the declarant himself was accused of the crime, or in *Williamson* where the declarant initially lied about his part in the drug conspiracy or even in *Wright* where the two-year-old declarant probably was led into accusing her mother of sexual molestation. Mark's confession of crimes he had committed with his brother and Gary Barker has the unmistakable ring of truth when considered under the totality of the circumstances surrounding the interviews. The state courts were well within constitutional parameters in finding them sufficiently reliable for admission into evidence.[25]

C. Any Error Was Harmless Beyond A Reasonable Doubt.

"[W]hen assessed in the context of the entire case against [the petitioner]," it is clear that, if any error occurred, it was harmless. *See Lee*, 476 U.S. at 547 (remanding case for harmless error analysis). Indeed, there can be no credible argument in Lilly's case that the

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[25] For cases finding no error under facts similar to Lilly's, *see Gilliam*, 635 N.E.2d at 1246; *Workman*, 860 F.2d at 144-145; *United States v. Smith*, 792 F.2d 441, 443-444 (4th Cir. 1986); *Keltner*, 147 F.3d at 670-671; *Taggart*, 944 F.2d at 840; *Earnest*, 87 F.3d at 1131-1132; *Oregon v. Neilsen*, 853 P.2d 256, 262-263 (Or. 1993); *Iowa v. Hallum*, 585 N.W.2d 249, 1998 Iowa Supp. LEXIS 238 at *8-11 (1998); *United States v. Vernor*, 902 F.2d 1182, 1187-1188 (5th Cir), *cert. denied*, 498 U.S. 922 (1990).

other evidence in the case did not overwhelmingly prove that he committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements on all material points. (JA 97-214).

It was the petitioner's car that was used at the outset of the crime spree and the petitioner's car that broke down, necessitating the carjacking that ended with the petitioner murdering the stolen car's owner. When he was apprehended wielding a shotgun, the petitioner lied to the police officers about his identity and that of his accomplices. When he was questioned by the police, he lied when he said he did not know who owned the stolen car, when he said he was forced to participate in the robberies and when he failed to mention the Sanders' break-in or the abduction and murder. *See Wright v. West*, 505 U.S. 277, 296 (1992) (false testimony probative of guilt). Lilly's rubbing of his hands on his clothing to remove the gunshot residue certainly was strong evidence of his guilt.

The petitioner also made incriminating statements: at the arrest site, he called to his brother in the woods to give himself up because Mark was "not the one who has done anything wrong;" in the police car, he asked Officer Whitsett to kill him and, when the officer asked what a murderer looked like, Lilly said "me." Forensic examination found blood on the petitioner's pants leg, yet no blood on Mark's clothes and no blood on Gary's clothes that was not his own.

Finally, as already noted, the prosecutor barely mentioned Mark's confession in his closing argument, and with good reason: Barker's testimony was "the key" to the case, providing all the necessary elements to convict.

(JA 360). When assessed in the context of the entire case, it is clear that Lilly's guilt was established by overwhelming evidence independent of the hearsay statements. The admission of the hearsay, even if erroneous, thus certainly was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1998

Benjamin Lee Lilly,
Petitioner,

v.

Commonwealth of Virginia,
Respondent.

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On Writ of Certiorari to the Supreme Court of Virginia

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REPLY BRIEF FOR PETITIONER

Petitioner respectfully submits that the result in this case is controlled by this Court's decision in *Lee v. Illinois*, 476 U.S. 530 (1986) and the logic of this Court's decision in *Williamson v. United States*, 512 U.S. 594 (1994). *Lee* reiterates the longstanding view that custodial statements by an accomplice which incriminate a defendant are presumptively unreliable and inadmissible under the Confrontation Clause absent particularized guarantees of trustworthiness. And if the presumption of inadmissibility was not rebutted in *Lee* -- where the statement by the declarant was plainly and unambiguously against his penal interest and where there was an interlocking confession by the defendant -- it *a fortiori* was not rebutted here -- where Mark Lilly's statements were self-serving and there was no confession by Petitioner.

Further, *Williamson* teaches that in assessing the admissibility of a custodial statement of an accomplice incriminating a defendant, the focus must be on the precise portion of the accomplice's confession implicating the defendant and not on the confession as a whole:

> The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded.

Williamson, 512 U.S. at 600 (citation omitted). In this case, the specific portions of Mark Lilly's statements incriminating Petitioner are not self-inculpatory.

What is more, *Lee* also makes plain -- consistent with the presumption of inadmissibility -- that it is irrelevant to the analysis whether the *general category* of declarations against interest is a firmly rooted hearsay exception. 476 U.S. at 544 n.5. Rather, the "firmly rooted" question is whether there is a firmly rooted hearsay exception which admits all statements in the category of custodial statements of an accomplice incriminating a defendant. The Commonwealth does not even address that issue. That is not surprising because there is no such firmly rooted hearsay exception.

Finally, in assessing whether the specific statement incriminating a defendant bears particularized guarantees of trustworthiness, the test is whether the

> declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . . [and] adversarial testing would add little to its reliability.

Idaho v. Wright, 497 U.S. 805, 820-21 (1990). In making that assessment, a court may look only to the circumstances surrounding the making of the statement by the declarant, and not to extrinsic evidence of trustworthiness that may be added by using hindsight. *Wright*, 497 U.S. at 820-23. Here, these circumstances belie any guarantees of trustworthiness.

I. ADMISSION OF MARK LILLY'S CUSTODIAL STATEMENTS INCRIMINATING PETITIONER VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

A. MARK LILLY'S STATEMENTS INCRIMINATING PETITIONER ARE PRESUMPTIVELY UNRELIABLE AND INADMISSIBLE ABSENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS WHICH ARE NOT PRESENT HERE.

Mark Lilly's custodial statements incriminating Petitioner must be constitutionally tested as "confession[s] by an accomplice which incriminate[ ] a criminal defendant." *See Lee*, 476 U.S. at 544 n.5. An accomplice's "'statements about what the defendant said or did are [not only] less credible than ordinary hearsay evidence,'" but are presumptively unreliable because statements "detailing the defendant's conduct or culpability . . . may well be the product of the accomplice's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 541, 545 (citation omitted). Accordingly, Mark Lilly's custodial confessions are inadmissible unless the weighty presumption of unreliability is rebutted. *Id.* at 543, 546.

Mark Lilly's custodial statements about Petitioner are patently less reliable than those which this Court in *Lee* found *inadmissible*. In *Lee*, the codefendant, Thomas, "confessed to extensive and cooperative involvement in [two murders]." *Id.* at 548 (Blackmun, J., dissenting). Indeed, Thomas admitted stabbing one victim and described conversations between himself and the defendant (Lee) immediately prior to the murders that implicated him in a premeditated plan to kill. *Id.* at 533-35; *id.* at 554 (Blackmun, J., dissenting). Thus, Thomas' confession was truly self-inculpatory even to the extent it implicated Lee. Moreover, Thomas' confession was substantially corroborated by Lee's own

confession (*id.* at 533-35) and other evidence at trial. *Id.* at 553-56 (Blackmun, J., dissenting).[1] Nonetheless, the Court concluded that there did not

> exist sufficient "indicia of reliability," flowing from either the circumstances surrounding the confession or the "interlocking" character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence.

Id. at 546.

Thomas' unambiguously self-inculpatory statements stand in stark contrast to Mark Lilly's statements in this case. Mark Lilly placed virtually all responsibility for the planning and commission of every crime on Barker and Petitioner, and specifically ascribed to Petitioner the entire blame for the murder of DeFilippis. By "ascribing the bulk of the blame to [his] confederates," and specifically "fingering" Petitioner as the triggerman in the murder, Mark Lilly "minimized his own criminal liability" and "greatly" advanced his penal interest. *See id.* at 552-53 (Blackmun, J., dissenting). Importantly, the specific statements by Mark Lilly implicating Petitioner as the triggerman were not corroborated by a confession by Petitioner (there was none) and were not self-inculpatory to Mark Lilly. Thus, under *Lee*, Mark Lilly's custodial statements do not bear

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1 Although, consistent with this Court's subsequent decision in *Wright*, the Court in *Lee* did not consider the extrinsic corroborating evidence that supported Thomas' confession, there was, in fact, physical evidence corroborating Thomas' confession.

the particularized guarantees of trustworthiness necessary to rebut the presumption of inadmissibility.

In assessing the admissibility of Mark Lilly's statements, the analysis must focus only on those specific statements that incriminate Petitioner and not Mark Lilly's overall custodial statements. *See Williamson*, 512 U.S. at 601, 603, 605 (citing *Lee*, 476 U.S. at 543-45).[2] Thus, the specific statements by Mark Lilly that implicate Petitioner may not be presumed to be admissible or reliable simply because they are part of a fuller confession that is in some other respects self-inculpatory. *See Williamson*, 512 U.S. at 601 (quoting *Lee*, 476 U.S. at 541). Instead, each specific statement by Mark Lilly incriminating Petitioner must be examined to determine whether it is truly self-inculpatory and sufficiently reliable to be admissible. *See Williamson*, 512 U.S. at 600, 603-04.

The portions of Mark Lilly's statements fingering Petitioner as the triggerman did not inculpate Mark Lilly at all; in fact, they are quite self-serving. Mark Lilly stated: "Me and [Barker], we didn't have nothing to do with shooting [DeFilippis], you know. . . . We didn't have nothing to do with the shooting." JA 256. He later asserted that "[Petitioner] shoots [DeFilippis]," adding that "me and [Barker] both thought"

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2 Although *Williamson* was decided under Rule 804(b)(3) and not the Confrontation Clause, if a statement is not sufficiently reliable to be admitted as a hearsay exception, it must also fail as an exception to the requirements of the Confrontation Clause.

that Petitioner would let DeFilippis go free and then take his car. JA 258-59. These statements pin sole and exclusive blame for the planning and commission of the murder on Petitioner, and are in no way adverse to Mark Lilly's penal interest.

The motives that render custodial confessions by an accomplice incriminating a defendant presumptively unreliable -- the "desire to shift or spread blame, curry favor, avenge himself, or divert attention to another," *Lee*, 476 U.S. at 544-45[3] -- apply with full force in this case. The Commonwealth mistakenly argues that Mark Lilly could not have shifted or spread blame because he was not, and could not have been, blamed for the murder. Comm. Br. 45; *see also* CJLF Br. 27. That is just plain wrong. Although the transcript of the first interrogation of Mark Lilly reflects that the interrogating officer stated that Barker and Petitioner had said Mark Lilly "didn't do it," the officer testified that, having only questioned Barker by that point in time, he would have referred only to what Barker had said. JA 278. Petitioner was not questioned until after Barker and Mark Lilly and even then, Petitioner was never asked about the murder, let alone who committed it. JA 63-79.

On the one hand, if the transcript is inaccurate and the interrogating officer only told Mark Lilly what Barker had said,

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3 The dissent in *Lee* agreed that custodial confessions by an accomplice that incriminated another are inevitably suspect and untrustworthy. 476 U.S. at 552-53 (Blackmun, J., dissenting).

the distinct possibility remained that Mark Lilly might be blamed by Petitioner for the shooting. On the other hand, if the transcript is accurate, and the officer either misspoke or lied about what Petitioner had said, Mark Lilly nonetheless had a strong incentive to minimize his role in the crimes and shift blame onto others. Mark Lilly may have doubted the veracity of the interrogating officer's statement. More important, even if Mark Lilly believed that he had not been blamed by Barker and Petitioner for having "done it," JA 257, Mark Lilly (justifiably) feared, as the Commonwealth concedes, that he would be charged with murder and robbery for his involvement. JA 307; Comm. Br. 47. Accordingly, the strong incentive remained for Mark Lilly to portray himself in the best possible light and to spread blame onto others in hopes of minimizing any prison sentence and securing leniency in exchange for his cooperation.

Had Mark Lilly testified, there would have been substantial bases for cross-examination. First, there was evidence that Mark Lilly was the triggerman: Mark Lilly sat with DeFilippis in the back seat of the car, JA 121; Mark Lilly had the murder weapon immediately before the murder, JA 124; Mark Lilly ordered DeFilippis to walk away from the car, JA 127; and DeFilippis' wallet was found along the route Mark Lilly took as he fled the scene, Tr. Oct. 21, 1996, 447, 449, 451-452; JA 142-44, 270-72. Second, Mark Lilly had the classic motivations to lie: to curry favor and to protect himself and Barker, his friend and roommate. Third, Mark Lilly's statements to police were contradicted on

numerous material points by Barker's testimony, the testimony of other witnesses, and the physical evidence. Pet. Br. 16-19.

The effect of cross-examination on these topics, if fully realized (*see Delaware v. Van Arsdall*, 475 U.S. 673, 683-84 (1986); *Davis v. Alaska*, 415 U.S. 308, 319 (1974)), would have done serious damage to Mark Lilly's credibility and to the Commonwealth's case. Exceptions to the strictures of the Confrontation Clause, however, are limited to those circumstances where cross-examination would be of marginal utility. *Wright*, 497 U.S. at 820-21. Mark Lilly's custodial statements incriminating Petitioner do not meet that test.

B. THERE IS NO FIRMLY ROOTED HEARSAY EXCEPTION FOR CUSTODIAL STATEMENTS BY AN ACCOMPLICE THAT INCRIMINATE A DEFENDANT.

1. *Lee* And Its Predecessors Preclude Finding That A Custodial Confession By An Accomplice That Incriminates A Defendant Falls Within A Firmly Rooted Hearsay Exception.

The Commonwealth and the *amici* States mistakenly rely on the widespread acceptance of the general hearsay exception for declarations against penal interest. Comm. Br. 27-28; States Br. 5, 8-10. The question here, however, is not whether that general hearsay exception is firmly rooted. Rather, it is whether custodial confessions by an accomplice that incriminate a defendant fall within a firmly rooted hearsay exception. This Court previously has indicated that custodial confessions by an accomplice that incriminate a defendant cannot fall within a firmly rooted hearsay exception.

The Court in *Lee* and its predecessors has made clear that custodial statements by an accomplice that incriminate a defendant are presumptively suspect, inherently unreliable and inadmissible absent particularized guarantees of trustworthiness. *See Lee*, 476 U.S. at 541-43; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *Bruton v. United States*, 391 U.S. 123, 135-36 (1968); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973); *see also Williamson*, 512 U.S. at 601; *id.* at 607-08 (Ginsburg, J, concurring in part and in judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970)(Harlan, J., concurring in result). Statements which are *presumptively suspect* and *inherently unreliable* cannot fall within a firmly rooted hearsay exception. The defining characteristic of a firmly rooted hearsay exception is that statements within such an exception are *inherently reliable* and are admissible without reference to particularized guarantees of trustworthiness. *See White v. Illinois*, 502 U.S. 346, 355 & n.8 (1992); *Bourjaily v. United* States, 483 U.S. 171, 183 (1987); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Thus, custodial statements by an accomplice incriminating a defendant cannot fall within a firmly rooted hearsay exception.

2. The Pervasive Judicial And Legislative Practice Of Precluding Or Restricting Admission of Custodial Statements By An Accomplice That Incriminate A Defendant Precludes Finding That Such Statements Fall Within A Firmly Rooted Hearsay Exception.

Moreover, even if controlling Confrontation Clause precedent did not preclude a finding of a firmly rooted hearsay exception applicable in this case, hearsay law also indicates that there is no firmly rooted hearsay exception covering custodial statements

by an accomplice that incriminate a defendant. Most jurisdictions preclude or restrict admission of custodial statements by an accomplice incriminating a defendant and only a handful of states permits their unrestricted admission.

Three states have no penal interest exception (or at least none that would apply under the circumstances presented in this case).[4] Moreover, nine states with a penal interest hearsay exception exclude from their exception *all* statements by an accomplice that incriminate a defendant.[5]

In addition to the foregoing twelve jurisdictions, ten states, as well as the District of Columbia, follow this Court's interpretation of the federal rule in *Williamson*, and restrict the penal interest exception to those specific statements by an arrested accomplice that are truly self-inculpatory, and do not admit statements which are collateral to the self-inculpatory portions.[6] Under such an interpretation, the portion of the

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4 Ala. R. Evid. 804(b)(3); Ga. Code Ann. § 24-3-8 (1998); *State v. Skillicorn*, 944 S.W.2d 877, 884-85 (Mo.), *cert. denied*, __ U.S. __, 118 S.Ct. 568 (1997).

5 *See* Ark. R. Evid. 804(b)(3); Ind. R. Evid. 804(b)(3); Me. R. Evid. 804(b)(3); Nev. Rev. Stat. § 51.345(2) (1997); N.J. R. Evid. 803(25); N.D. Cent. Code § 804(b)(3) (1998); Vt. R. Evid. 804(b)(3); *State v. Boyd*, 570 A.2d 1125, 1128 (Conn. 1990). Kansas also appears to preclude admission of accomplice statements incriminating a defendant. *See State v. Myers*, 625 P.2d 1111, 1115-16 (Kan. 1981).

6 *See Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994); *United States v. Hammond*, 681 A.2d 1140, 1146 (D.C. 1996); *State v. Hallum*, 585 N.W.2d 249, 256 (Iowa 1998); *State v. Smith*, 643 So. 2d 1221, 1221-22 (La. 1994); *State v. Matusky*, 682 A.2d 694, 706 (Md. 1996); *State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995); *State v. Castle*, 948 P.2d 688, 694 (Mont. 1997); *State v. Torres*, No. 24,000, 1998 WL 896350, at *12 (N.M.

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custodial confession here incriminating Petitioner would not have been admissible. *See* pp. 5-6 *infra*.

Similarly, four other states exclude from the penal interest exception those statements or portions of statements that are self-serving and not against the declarant's penal interest.[7] Finally, three other states preclude admission of custodial statements by an accomplice where the statements minimized the accomplice's responsibility and shifted blame onto others or incriminated others in more serious crimes.[8] Thus, the total number of jurisdictions that would preclude admission of statements such as those at issue here totals thirty.

Contrary to the practice in these numerous jurisdictions, only a few states permit admission of an entire statement, portions of which are against the declarant's penal interest and portions of which only incriminate a defendant.[9] Three of those

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Dec. 3, 1998); *Miles v. State*, 918 S.W.2d 511, 515 (Tex. Crim. App. 1996); *In re Anthony Ray*, 489 S.E.2d 289, 298 (W. Va. 1997); *Johnson v. State*, 930 P.2d 358, 363 (Wyo. 1996).

7 *See People v. Campa*, 686 P.2d 634, 640 (Cal. 1984); *People v. Newton*, 966 P.2d 563, 578-79 (Colo. 1998); *People v. Watkins*, 475 N.W.2d 727, 736-39 (Mich. 1991) (plurality); *People v. Brensic*, 509 N.E.2d 1226, 1229 (N.Y. 1987).

8 *See State v. Hoak*, 692 P.2d 1174, 1179 (Idaho 1984); *Williams v. State*, 667 So. 2d 15, 20 (Miss. 1996); *State v. Whelchel*, 801 P.2d 948, 954-55 (Wash. 1990).

9 *See State v. Gilliam*, 635 N.E.2d 1242 (Ohio 1994); *State v. Nielsen*, 853 P.2d 256 (Or. 1993); *State v. Kiewert*, 605 A.2d 1031 (N.H. 1992); *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1990); *State v. Wilson*, 367 S.E.2d 589, 592 (N.C. 1988).

states, however, have not addressed statements made in a post-arrest custodial interrogation.[10] Moreover, two other states have only ruled on statements that neither attempted to exonerate the arrested accomplice nor shift blame onto others.[11] Thus, *only Virginia* admits an entire blame-shifting custodial statement by an accomplice incriminating a defendant as a declaration against penal interest.

For all of the foregoing reasons, there is no firmly rooted hearsay exception applicable in this case.

C. THE CIRCUMSTANCES SURROUNDING THE MAKING OF MARK LILLY'S STATEMENTS DO NOT PROVIDE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS.

In this case, only the circumstances surrounding the making of Mark Lilly's statements may be used to determine whether the statements possess sufficient indicia of reliability and particularized guarantees of trustworthiness to rebut the weighty presumption of inadmissibility. *See Wright*, 497 U.S. at 819-21; *Lee*, 476 U.S. at 546.[12] Those circumstances were no different than the typical custodial interrogation, and do not rebut the presumption of inadmissibility. *See* pp. 3-7 *supra*.

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10 *See Taylor*, 821 S.W.2d at 74; *Kiewert*, 605 A.2d at 1036-37; *Wilson*, 367 S.E.2d at 592.

11 *See Gilliam*, 635 N.E.2d at 1246; *Nielsen*, 853 P.2d at 263-64, 269-70.

12 Petitioner did not confess to the murder; indeed he was never even questioned about it. As a result, there is no issue regarding the weight, if any, to be accorded an interlocking defendant's confession. *See Cruz v. New* York, 481 U.S. 186, 192-94 (1987).

The Commonwealth argues that *Wright* does not apply here, but its arguments ignore the constitutional dimensions of this case.[13] For Confrontation Clause purposes, there is no reasoned distinction between the hearsay statements at issue in *Wright* and those at issue in this case. Custodial statements by an accomplice incriminating a defendant and statements offered under a residual hearsay exception implicating a defendant both are presumed unreliable and inadmissible, and both must be excluded absent a showing of particularized guarantees of trustworthiness. *See Wright*, 497 U.S. at 818; *Lee*, 476 U.S. at 543. Here, then, as in *Wright*,

> the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result . . . at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination would be of marginal utility.

See 497 U.S. at 823. In this case, there were no constitutionally-relevant particularized guarantees of trustworthiness for Mark Lilly's statements.[14] *See* Pet. Br. 44-49.

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13 The Commonwealth also argues that, since there is a firmly rooted hearsay exception applicable to this case, the inquiry into reliability merely is an extra protection beyond what is constitutionally required. There is, as demonstrated above, no such firmly rooted exception, and as explained above, establishing reliability through the use of extrinsic corroborating evidence is constitutionally prohibited.

14 The Commonwealth's contention that Mark Lilly's statements are reliable because they were made voluntarily after he was read his *Miranda* rights

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II. PETITIONER'S CONFRONTATION CLAUSE CLAIM WAS PRESERVED.

Petitioner undeniably argued below (both before the trial court and the Virginia Supreme Court) that admission of Mark Lilly's custodial statements violated the Confrontation Clause. JA 7-8, 225-29, 232-33, 236, 475-84, 571-73, 604-12. Indeed, Petitioner specifically discussed *Lee* and *Williamson*, the principal cases upon which he now relies, in his reply brief to the Virginia Supreme Court. JA 571-73. Furthermore, the claim was addressed on the merits by both courts. JA 234-36, 594-95. Accordingly, Petitioner preserved his Confrontation Clause claim. *See Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).[15]

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is unavailing. Comm. Br. 47. As this Court has concluded, a finding of voluntariness for Fifth Amendment purposes "does not bear on the question of whether the confession was also free from any desire, motive, or impulse [Mark Lilly] may have had . . . to mitigate the appearance of his own culpability by spreading the blame." *See Lee*, 476 U.S. at 544.

The Commonwealth's argument that Mark Lilly's statements are reliable because he was not offered any form of leniency in return for his statements is similarly without merit. Comm. Br. 47. The Commonwealth's contention "turns *Lee* on its head"; it assumes, contrary to *Lee*, that Mark Lilly's statements detailing Petitioner's conduct are admissible unless there is affirmative evidence of unreliability. *See Watkins*, 475 N.W.2d at 743. While a promise of leniency would constitute affirmative evidence of unreliability, it does not follow that the absence of such a promise overcomes the weighty presumption of unreliability. Moreover, during the interrogations, Mark Lilly was informed that a court would look upon him favorably if he gave a confession, that the police were the only people that were going to do anything to help him, and that he need not "share" in a "lifetime sentence" if Petitioner "done it without . . . [c]onsent of everybody." JA 247-48, 257, 308.

15 The arguments Petitioner now makes to this Court also were preserved by presenting them to the Virginia Supreme Court in a petition for

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III. THE ERRONEOUS ADMISSION OF MARK LILLY'S STATEMENTS INCRIMINATING PETITIONER WAS NOT HARMLESS.

The Commonwealth has not met its burden of establishing, beyond a reasonable doubt, that the erroneous admission of Mark Lilly's statements to police incriminating Petitioner did not contribute to the guilty verdict and sentence of death. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *Van Arsdall*, 475 U.S. at 684.[16] The Commonwealth's burden of proof on capital murder required establishing, beyond a reasonable doubt, that Petitioner shot DeFilippis. Significantly, the Commonwealth presented no physical evidence whatsoever that Petitioner was the triggerman. Its evidence on this issue consisted *solely* of Barker's self-serving testimony and Mark Lilly's uncross-examined statements. Here, as in *Fulminante*, as a result of the significant role Mark Lilly's devastating statements likely

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rehearing, JA 604-12, which the court considered and denied. JA 614. *See Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Further, having preserved the constitutional claim below, Petitioner was well within his rights to subdivide the claim into three component issues, as he has done in presenting his claim to this Court. "[This Court's] traditional rule is that '[o]nce a federal claim is properly presented a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron*, 513 U.S. at 379 (citation omitted); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899).

16 The factors cited by this Court in *Van Arsdall*, a case involving the limitation of cross-examination on the issue of a witness' possible bias, all support the conclusion that the error in this case was not harmless. *See* 475 U.S. at 684 ("the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case").

played with jurors, particularly in relation to Barker's highly suspect testimony, the erroneous admission of Mark Lilly's confession was not harmless beyond a reasonable doubt. *See* 499 U.S. at 297-302.

In *Fulminante*, this Court rejected the Arizona Supreme Court's holding that the erroneous admission of the defendant's involuntary confession to Anthony Sarivola was harmless. The Arizona court found that the defendant's subsequent confession to Donna Sarivola, which was properly admitted, rendered the inadmissible confession to Anthony Sarivola cumulative, and that circumstantial evidence concerning the victim's wounds, the location of the body, and the presence of motorcycle tracks at the scene corroborated defendant's confession to Donna Sarivola. *Id.* at 296-97. The state court therefore concluded that "'due to the overwhelming evidence adduced from the second confession [to Donna Sarivola], if there had not been a first confession [to Anthony Sarivola], the jury would still have had the same basic evidence to convict' . . . ." *Id.* at 297 (citation omitted).

This Court rejected that analysis. First, this Court cautioned that a "reviewing court [should] exercise extreme caution before determining that the admission of the confession at trial was harmless." *Id.* at 296. Second, this Court counseled that "the jury's assessment of the confession to Donna Sarivola could easily have depended in large part on the presence of the confession to Anthony Sarivola." *Id.* at 298. As this Court explained, the jury might have found that Donna Sarivola's story was unbelievable, or that she lied to assist her husband or

to receive favorable treatment for herself. *Id.* at 298, 300. Although some details of the confession to Donna Sarivola were corroborated by circumstantial evidence, the only evidence corroborating other aspects of the confession -- including the defendant's motive and state of mind -- was the confession to Anthony Sarivola. *Id.* at 299. Accordingly, the Court concluded, "it is clear that the jury might have believed that the two confessions reinforced and corroborated each other. For this reason, one confession was not merely cumulative of the other." *Id.* & n.9. Finally, this Court observed that "both the trial court and the State recognized that a successful prosecution depended on the jury believing the two confessions." *Id.* at 297.

Fulminante compels the conclusion that the admission of Mark Lilly's statements was not harmless. First, the substantial risk that Mark Lilly's custodial statements incriminating Petitioner were unreliable, *see Lee*, 476 U.S. at 545, coupled with the devastating impact that an accomplice confession incriminating a defendant has upon a jury, *see Bruton*, 391 U.S. at 135-36, requires extreme caution before finding that the admission of Mark Lilly's statements was harmless. *See Fulminante*, 499 U.S. at 296.

Second, the jury's assessment of Barker's testimony could easily have depended in large part on Mark Lilly's statements. *See Fulminante*, 499 U.S. at 298. The jury might well have found Barker's story unbelievable due to inconsistencies between it and other evidence, Pet. Br. 10-12, and because Barker had a motive to lie. *Id.* at 6-7, 16. Notably, unlike *Fulminante*, the

circumstantial evidence did not substantially corroborate the details of Barker's testimony regarding the murder. The testimony of the forensic expert, for example, contradicted Barker's testimony regarding the distance from which the shots were fired. *Id.* at 10. Because other aspects of Barker's story were only corroborated by Mark Lilly's statements to police, the jury might have found that Barker's testimony and Mark Lilly's statements reinforced and corroborated each other. *See Fulminante*, 499 U.S. at 299.[17]

Finally, the Commonwealth recognized that a successful prosecution depended on the jury believing both the testimony of Barker and the statements of Mark Lilly. Pet. Br. 8; *see Fulminante*, 499 U.S. at 297. Indeed, the Commonwealth propounded a theory of the case that would resonate with any juror - two witnesses are better than one.[18] Accordingly, because the jury's

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17 The admission of Mark Lilly's statements undoubtedly undercut the effect of Barker's cross-examination. *See Fulminante*, 499 U.S. at 299 n.9.

18 Here, as in *Fulminante*, the circumstantial evidence was otherwise insufficient to convict. *See* 499 U.S. at 297. That Petitioner used the name Michael Rader when arrested does not prove that Petitioner committed the murder. In fact, Mark Lilly did the same thing when he was arrested. JA 272. Likewise, Petitioner's alleged warnings to Mark Lilly to turn himself in, JA 216, do not speak to whether Petitioner was the triggerman.

Police Chief Whitsett's assertions that Petitioner asked to be killed the night he was arrested and then said something that "*sounded* like he said me" in response to the question, "what does a murderer look like anyway?", JA 220, 224-25 (emphasis added), are similarly insufficient. Even if Whitsett correctly heard what was said - and there is ample reason to question whether he could have heard Petitioner, JA 222-24 - the exchange shows merely that Petitioner was extremely upset about what had happened. It does not establish that Petitioner was the triggerman.

Footnote continued

verdict could easily have depended on Mark Lilly's statements to police, either independently or in combination with Barker's testimony, the erroneous admission of Mark Lilly's statements was not harmless beyond a reasonable doubt.

Compliance with the foregoing requirements of the Confrontation Clause does not usurp the fact-finding function from the State courts or enforcement of the criminal law from the States. *See* Comm. Br. 42-44. Rather, it merely requires that a trial court, when assessing the admissibility of a custodial statement by an accomplice that incriminates a defendant: (1) recognize that such statements are inherently unreliable and presumptively inadmissible; (2) focus on the specific portion(s) of the

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Footnote continued from previous page

Indeed, if such an emotional outburst identifies Petitioner as the triggerman, the same must be said with respect to Barker, who, when arrested, was found sitting with a shotgun in his mouth, preparing to shoot himself "[f]rom what I seen and, and, and, and for what I did." JA 144-45, 194.

Furthermore, that Petitioner rubbed his hands together after having been given the option of taking a paraffin test, JA 82, does not prove his responsibility for the murder. It proves, at most, that he was concerned that he had fired a firearm, which the Commonwealth concedes occurred when the three men stopped by the roadside to fire the stolen weapons. JA 110.

The Commonwealth's reliance on evidence of blood on the *lower back side* of Petitioner's pant leg, JA 92-93, proves absolutely nothing and is particularly offensive. The blood was on the opposite side of where it would have been if Petitioner had been splattered with DeFilippis' blood. More importantly, the Commonwealth's own expert admitted that she could not even tell whether the blood was human blood, much less from DeFilippis: the evidence concerning the blood on the pant leg was inconclusive - the amount was too small for DNA testing to be performed - and *she could not exclude the possibility that the blood was non-human, i.e., from the goose that had been shot the day of the murder and thrown in the trunk of the car.* JA 94, 112.

statement incriminating the defendant -- and not the statement as a whole -- in determining whether the statement is truly against the declarant's penal interest; and, if it is, (3) look only to the circumstances surrounding the making of the statement in determining whether there are particularized guarantees of trustworthiness such that adversarial testing would add little to the statement's reliability and cross-examination of the declarant would be of marginal utility. Only then may a custodial statement by an accomplice that incriminates a defendant constitutionally be admitted.

CONCLUSION

For all of the foregoing reasons, the judgment of the Virginia Supreme Court should be reversed and this matter remanded for a new trial.

Dated: New York, New York
March 3, 1999

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MOTION FILED
DEC 18 1998

No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS, AND VIRGINIA CAPITAL CASE CLEARINGHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against interest of an unavailable witness when the alleged accomplice refused to testify under the Fifth Amendment, violates the Sixth and Fourteenth Amendments?

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN L. LILLY,

Petitioner,

vs. No. 98-5881

COMMONWEALTH OF VIRGINIA,

Respondent.

MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA CAPITAL CASE CLEARINGHOUSE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

COME NOW the National Association of Criminal Defense Lawyers (NACDL), the Virginia College of Criminal Defense Attorneys (VCCDA), and the Virginia Capital Case Clearinghouse (VCCC), pursuant to Supreme Court Rule 37.2(b), and move this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioner. In support of this motion, NACDL, VCCDA, and VCCC state the following:

1. Counsel for Petitioner has consented to the filing of an *amicus curiae* brief by NACDL, VCCDA and VCCC. Counsel for Respondent has withheld consent.

2. NACDL is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it

full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the are of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

3. VCCDA is recognized by NACDL as its Virginia state affiliate. It is a statewide non-profit organization of approximately 416 criminal defense practitioners. It's purpose is to enhance and improve the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the particular framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners, and provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system. These services include litigation advice and support, research, and amicus briefing.

4. Virginia Capital Case Clearinghouse is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal; making the right to effective assistance of counsel meaningful in Virginia capital cases. That goal also describes the interest of VCCC in the case at bar.

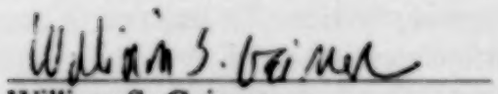
Virginia Capital Case Clearinghouse has been in operation since 1988, and has assisted defense counsel in hundreds of cases, including this case at trial and on direct

appeal. That experience has provided a unique vantage point from which to assess the issues before this Court.

5. The movants submit that an *amicus curiae* brief is desirable in light of the impact any decision made in the case will have on the Sixth Amendment right to confrontation. The movants seek leave to submit the accompanying brief *amicus curiae*, which they hope will assist the Court in deciding the Constitutional issue before it.

WHEREFORE, based upon the foregoing, NACDL, VCCDA and VCCC respectfully request that this motion be granted.

Respectfully Submitted,



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INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), the Virginia College of Criminal Defense Attorneys ("VCCDA"), and the Virginia Capital Case Clearinghouse, A Special Project of Washington and Lee University School of Law ("VCCC"), pursuant to this Court's Rule 37.3(a), file this joint brief in support of the petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has withheld consent.[1]

NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

VCCDA is recognized by NACDL as its Virginia state affiliate. It is a statewide non-profit organization of

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL, VCCDA, or VCCC and their members made any monetary contributions to its preparation or submission. *See* Rule 37.6.

approximately 416 criminal defense practitioners. Its purpose is to enhance and improve the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the particular framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners, and provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system. These services include litigation advice and support, research, and amicus briefing.

Virginia Capital Case Clearinghouse is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal: making the right to effective assistance of counsel meaningful in Virginia capital cases.[2] That goal also describes the interest of VCCC in the case at bar.

Virginia Capital Case Clearinghouse has been in operation since 1988, and has assisted defense counsel in hundreds of cases at trial and on direct appeal. That experience has provided a unique vantage point from which to assess the issue before this Court. It is particularly important in the Commonwealth of Virginia that the Confrontation Clause of the Sixth Amendment not be reduced to a mere form of words.[3]

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2 The program statement of purpose reads: "The Virginia Capital Case Clearinghouse is not about theoretical or philosophical support for or opposition to the death penalty. Rather, it is about commitment to the principle that one who stands to forfeit his life is entitled to the effective assistance of counsel, both for his sake and for the sake of those who would take that life."

3 Amici adopt the petitioner's Statement of Facts.

SUMMARY OF ARGUMENT

While all hearsay statements of accomplices in custody are inherently unreliable, the statement of Mark Lilly was even more suspect than usual. Virginia law governing accomplice liability in capital murder prosecutions operates to render Mark Lilly's statement that Benjamin Lilly caused the victim's death not only unreliable, but actually self-serving. The hearsay statement, if true, shielded Mark Lilly from a possible death sentence and even relieved him from a mandatory sentence of life without parole. The self-inculpatory aspects of his statement pale in comparison to the benefits that would accrue to him under Virginia law. Particularly in Virginia, there is no reason to establish a Confrontation Clause standard that is less stringent than that applied by this Court under the Federal Rules of Evidence.

In Virginia, as elsewhere, capital murder prosecutions involving multiple defendants who name others as the "trigger" are common. These statements are often given to law enforcement officers who have no independent corroborating information and sometimes have little interest in obtaining it. Currently, many of these purported accomplices enter into plea agreements that provide for their testimony at the trial of the person they have named. Presently, it is the function of confrontation and cross-examination to allow the jury to assess the factors that influenced the statements of the purported accomplice who arrived first at the office of the prosecutor.

"[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting

Lee v. Illinois, 476 U.S. 530, 541 (1986)). The ability to confront and cross-examine one's accuser is fundamental and essential to a fair trial. As this Court has recognized, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). And, regarding

> confrontation and cross-examination this Court said in *Green v. McElroy*, 360 U.S. 474, 496-97:
>
> > They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion.

Pointer v. Texas, 380 U.S. 400, 404 (1965).

Unless the defendant has an opportunity to cross-examine the very person who is pointing the finger at him and accusing him of being the "triggerman," the jury will have no basis for determining the trustworthiness of the statement. Where jurors have the opportunity to see the witness confronted, they have the ability to observe for themselves the witness' demeanor and may decide, as is their right, not to credit the witness' testimony. As a practical matter, however, if the protection of the Confrontation Clause is withdrawn by this Court, Virginia prosecutors will be encouraged not to run this risk. It is difficult to imagine a case where the better choice of prosecution witness would not be the law

enforcement officer who took the statement of the purported accomplice. Efficiency might be enhanced by such a practice, but truth wold certainly be the principal casualty.

The constitutional error in this case was far from harmless. The issue before this Court is of great importance in the capital appellate law of Virginia, as well as other states, where the application of evidentiary rules results in the denial of an accused's constitutional right to confrontation. With the exception of relief compelled directly by decisions of this Court, the Supreme Court of Virginia has granted relief to death sentenced prisoners only twice in this decade. In both instances the basis for relief was insufficiency of the evidence that the defendant caused the death of the victim. Absent the unlawfully admitted hearsay statement of Mark Lilly, it is highly probable that Ben Lilly would not be on death row.

ARGUMENT

I. SELF-SERVING STATEMENTS WHICH SHIFT THE BLAME FOR A CRIME TO ANOTHER ARE UNRELIABLE AND INADMISSIBLE.

Our Constitution presumes that the accurate determination of guilt or innocence in a criminal case is best accomplished by giving the accused the opportunity to confront and cross-examine witnesses against him. Despite the seemingly absolute terms of the Confrontation Clause, tradition makes exception for out-of-court statements by unavailable declarants under circumstances that assure some degree of reliability. This can be accomplished in either of two ways: by showing that the statement fits within a "firmly rooted" hearsay exception, or by establishing from the circumstances of the particular statement indicia of trustworthiness. *Idaho v.*

Wright, 497 U.S. 805 (1990).

This case involves the admission of a statement by Mark Lilly following his arrest in which he disavowed responsibility for a murder during the course of a robbery and identified petitioner as the triggerman. This statement protected Mark Lilly from prosecution for capital murder, despite his participation in a string of robberies, including one resulting in a death, and despite evidence that he possessed the murder weapon and passed it to petitioner immediately before the shooting. JA 2051, 2063-64. For petitioner, admission of this statement made the difference between a conviction for first degree murder and a conviction for capital murder; under Virginia law, evidence that petitioner was the triggerman was needed to make him eligible for a death sentence. Given the crucial importance of the identity of the triggerman under Virginia's death penalty scheme and Mark Lilly's interest in avoiding prosecution for capital murder, his hearsay statements were inherently unreliable and their admission violated the Confrontation Clause, applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. at 404.

A. The Hearsay Testimony Of Mark Lilly Was Self-Serving And Devoid Of Reliability.

The true significance of Mark Lilly's hearsay testimony can only be understood by reference to Virginia state law. Title 18.2, section 18 of the Code of Virginia contains the common provision that accomplices may be indicted, tried, and punished as principals in the first degree.[4] In cases of **capital murder**, however, the section provides that accomplices may be convicted of no higher offense than first degree murder, a non-capital offense.[5]

For Mark Lilly, acceptance as truth of his statement naming Ben Lilly as the person who caused the death of the victim meant the first of two enormous benefits accruing to Mark Lilly: immunity from exposure to a sentence of death. This is hardly an indicia of reliability. It is, in fact, just the opposite.

The second great benefit accruing to Mark Lilly if his statement was believed was the possibility of one day regaining his liberty. That possibility is not provided for in the case of persons convicted of capital murder in Virginia, even if they are sentenced to life in prison rather than death. In Virginia, a defendant convicted of capital murder faces one of two mandatory penalties: a sentence of death or life imprisonment without possibility of parole.[6] A defendant convicted of first degree murder, on the other hand, is guilty only of a Class 2 felony.[7] Not only is the possibility of the death penalty completely removed,[8] the defendant may be sentenced to as

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[4] "[I]n the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree . . . ." Va. Code Ann. § 18.2-18 (Michie 1997).

[5] "An accessory before the fact or principal in the second degree to capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." Id. (emphasis added).

[6] . Va. Code Ann. § 19.2-164.4 (Michie 1998). Any defendant sentenced to a term of incarceration for a felony in Virginia on or after January 1, 1995, is not eligible for parole. Va. Code Ann. § 53.1-165.1 (Michie 1994).

[7] Va. Code Ann. § 18.2-32 (Michie 1998).

[8] Va. Code Ann. § 18.2-10 (Michie 1995).

little as 20 years.[9]

Therefore, when Mark Lilly stated his version of the criminal events, giving himself a secondary role in the crime while fingering his brother Ben Lilly as the triggerman, he actually did himself a great service. While his story contains self-inculpatory statements, within the framework of Virginia law described above and in the context of a custodial statement to police, it is actually quite self-serving.

B. Admission Of Mark Lilly's Confession As An Exception To The Hearsay Rule By Categorizing The Confession As A Declaration Against Penal Interest Cannot Be Squared With The Requirements Of The Confrontation Clause.

In Virginia, declarations against interest are admissible as an exception to the hearsay rule based on the notion that a person will not usually make statements damaging to his own penal interests unless such statements are true.[10] This is also the reasoning behind the federal evidentiary hearsay exception for statements against interest.[11] However, as a general matter, "[w]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to cross-examination." *Lee v. Illinois*, 476 U.S. at 541 quoted in *Williamson v. United States*, 512 U.S. at 608 (Ginsburg, J., concurring).

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9 *Id.*

10 2 Charles E. Friend, The Law of Evidence in Virginia § 18-12 (4th ed. 1993) (citing Eppes v. Eppes, 169 Va. 778, 195 S.E. 694 (1938)).

11 *See* Fed. R. Evid. 804(b)(3).

In *Williamson*, the defendant was convicted in a proceeding that featured the introduction by the state of a hearsay statement of the co-defendant. The hearsay testimony consisted of a confession that was broadly inculpatory of the co-defendant while also shifting criminal liability to Williamson. This Court found that "the most faithful reading of [the hearsay exception for statements against interest] is that it does not allow for the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson*, 512 U.S. at 600-01.

The facts of the instant case present an even more compelling need for the right to confront and cross-examine accusers than was present in *Williamson*. There, as this Court noted, the hearsay statement of witness Harris, if true, might have had the effect of rearranging the hierarchy of liability in a drug transaction, to Harris' benefit. This possibility was sufficient to call for remand to the Court of Appeals. *Williamson*, 512 U.S. at 604. Here, the benefit to Mark Lilly was quite literally a matter of life, death, and even potential liberty.

Although the *Williamson* court divided over the proper interpretation of Federal Rule of Evidence 803(b)(4) (declarations against penal interest), all members of the Court recognized that a statement like the one admitted at petitioner's trial does not bear the indicia of reliability associated with a statement against the declarant's penal interest. "The rationale for the hearsay exception for statements against interest is that people seldom 'make statements which are damaging to themselves unless satisfied for good reason that they are true.'" *Williamson*, 512 U.S. at 611 (Kennedy, J., dissenting) (quoting Notes of the Advisory Committee to Rule 804(b)(3)). The *Williamson* dissent went on to differentiate statements which

fit this definition from statements which, while containing some self-incriminatory information, primarily serve the declarant's interest:

> In the criminal context, a self-serving statement is one that stands to reduce the charges or mitigate the punishment for which the declarant might be liable. For example, if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible.

Williamson, 512 U.S. at 618 (Kennedy, J., dissenting). Thus, the dissenting justices agreed that a statement interwoven with declarations against penal interest should nevertheless be excluded when it is unreliably self-serving because "it shifts the blame to someone else for a crime the defendant could have committed," or when the declarant had a motive to obtain favorable treatment by making the statement. *Williamson*, 512 U.S. at 620. *See Williamson*, 512 U.S. at 601("a statement admitting guilt and made while in custody may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."); 512 U.S. at 607 (Scalia, J., concurring) (same). As in *Williamson*, "[a] reasonable person in [Mark Lilly's] position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." 512 U.S. at 604.

The unreliability of Mark Lilly's statement implicating petitioner as the triggerman is made even more apparent by the fact that, at the time of petitioner's trial, the charges against Mark Lilly were unresolved and the prosecution held over

Mark Lilly's head "the option charging [him] as the trigger man if he change[d] his story during his brother's trial and trie[d] to take the blame. JA 3605. Thus, the actions of the prosecution made him an unavailable witness when he invoked the Fifth Amendment, thereby satisfying the requirement for admitting the out-of-court statement. In short, the prosecution was able to choose whether the jury would hear from a live witness or whether it would receive self-serving hearsay.

While Virginia is free to define for itself the scope of its hearsay exception for declarations against penal interest, it cannot, by doing so, bypass the constitutional inquiry into the reliability of an out-of-court statement. The Virginia Supreme Court thought the fact "[t]hat Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not their admissibility." *Lilly v. Virginia*, 255 Va. 558, 499 S.E. 2d 522, 534 (1998). But the whole point of the Confrontation Clause is that cross-examination is the best means to allow the jury to determine how much weight to give an accusation in light of the witness' self-interest in making it. The absence of cross-examination impairs the jury's ability to determine the weight it should give to evidence, and distorts the fact-finding process. As all members of this Court recognized in *Williamson*, self-serving statements like the statement admitted against petitioner are not reliable and are inadmissible even when interwoven with admissions of criminal liability. This Court has not yet determined whether the hearsay exception for declarations against penal interest is "firmly rooted," or whether the constitutional inquiry depends upon the circumstances surrounding each statement. *Williamson*, 512

U.S. at 605. Regardless of the answer to this question,[12] whether a particular statement falls within a "firmly rooted" hearsay exception is a question of federal constitutional law, not one determined by the scope recently given to a hearsay exception under the law of a particular state.

II. A HOLDING IN FAVOR OF THE COMMONWEALTH WILL EFFECTIVELY EVISCERATE THE SIXTH AMENDMENT CONFRONTATION CLAUSE IN VIRGINIA CAPITAL CASES.

Because under Virginia law only the person who caused death, the "triggerman," may be convicted of capital murder, this issue is of paramount importance in the Commonwealth. This is especially true when there is an absence of forensic or other independent evidence pointing unerringly to one of several co-defendants. The existence of multiple potentially culpable persons in an individual murder has rendered the triggerman issue central to the Commonwealth's case in numerous capital prosecutions.[13] In many such cases, the main

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12 On this point, this Court, in *Lee v. Illinois*, rejected the state's "categorization" of an accomplice's confession "as a simple 'declaration against penal interest" because "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. at 544 n5. In addition, at common law the declarations against interest exception applied only to civil (not criminal) interests, making it implausible that the authors of the Confrontation Clause envisioned an exemption for statements like the one at issue in this case.

13 *See, e.g., Commonwealth v. Selby*, No. CR 96-51-0010202 (Cir. Ct. Dinwiddie County); *Commonwealth v. Burton*, No. F91-214 (Cir. Ct. Wise County); *Commonwealth v. Taylor*, No. 95-146,147, 148, 149 (Cir. Ct. Washington County); *Commonwealth v. Murray*, No. CR 901478 (Cir. Ct. City of Virginia Beach); *Commonwealth v. Holden*, No. 97 CR 141 (Cir. Ct. Accomack County); *Commonwealth v. Davis*, No. CR 94118-121 (Cir. Ct.

evidence implicating the defendant as the triggerman is derived from purported accomplices to the crime, who claim that they were not the one who killed the victim.[14] In the absence of compelling independent evidence on the point, its resolution may be heavily influenced by a race to the prosecutor's office. The triggerman statute creates an incentive, under circumstances of highly questionable reliability, for these co-defendants to make a plea agreement with the government in exchange for testifying that another defendant caused the victim's death.

Even under present law, the situation described above places a heavy burden on the right to confront and cross-examine as the primary device for ferreting out the truth.[15] If that right is removed, accurate identification of the accused who can lawfully be subjected to the death penalty will become a guessing game in many cases, further infused with arbitrary

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Smyth County); *Commonwealth v. Jones*, No. 8230 (Cir. Ct. York County).

14 *See Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994); *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994); *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993); *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157 (1987); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); *Fitzgerald v. Commonwealth*, 233 Va. 615, 292 S.E.2d 798 (1982); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979).

15 This is undoubtedly the reason this Court long ago declared the right to be fundamental and has emphasized its pivotal role in criminal trials. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965). This Court also recognized long ago the importance to reliable capital sentencing of correctly determining who caused death. That question prompted this Court's seminal opinion on the due process right of an accused to exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Both the question and the means available to answer it then, have been deemed essential to due process.

factors. That is because, while co-defendants have great incentive to name another as the killer, prosecutors will have little or no incentive to put them on the witness stand. If this Court upholds the Commonwealth's position in this case, there will be no reason for the state to put a purported accomplice on the stand and risk a potentially damaging cross-examination by defense counsel. Rather, the chosen tactic will be either to present the taped out of court statement, as in this case, or, even better, to have the fortunate chosen co-defendant make his statement to a law enforcement officer who can then testify at trial.[16]

A recent example of the critical need to subject purported accomplice testimony to cross-examination may be found in the cases of *Commonwealth v. Louis James Ceparano*, No. 97-186, 97-187 (Cir. Ct. Grayson County), and *Commonwealth v. Emmett W. Cressell, Jr.*, No. 98-73 (Cir. Ct. Grayson County). Both arose from the murder of G.P. Johnson on July 25, 1997, in Grayson County, Virginia. Ceparano, Cressell, Johnson and two women had been drinking together at Ceparano's trailer in Grayson County during the evening of July 24, 1997. In the early-morning hours of July 25, Johnson was burned and beheaded. The Commonwealth's Attorney initially decided that Ceparano killed Johnson. Ceparano was charged with capital murder and Cressell with first degree murder. Later, however, it was decided that Cressell was the "triggerman". Accordingly, a plea agreement was made with Ceparano and the charges against Cressell were upgraded to capital murder. At Cressell's trial, Ceparano testified for the prosecution, recounting the events of that night and implicating Cressell as the "triggerman" responsible for Johnson's murder. Ceparano was subjected to a two-hour

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16 *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994).

cross-examination by Cressell's counsel. The jury returned a verdict of not guilty of the capital murder charge, instead convicting Cressell of first degree murder.[17]

If this Court upholds the position advanced by the Commonwealth, in future cases involving similar evidence, the Commonwealth will have no reason to put a Ceparano on the stand. After reaching an agreement with a co-defendant, it will be a simple matter to prosecute the alleged principal first, use the co-defendant's hearsay statement, and conclude the agreed upon disposition of the co-defendant's case later. This practice would preserve the Fifth Amendment "unavailability" of accused who had made the deal, rendering his hearsay statement admissible as a declaration against penal interest. As a practical matter, there is little reason to expect that this would not be precisely the practice that will flow from a holding in favor of the Commonwealth. The principal casualty in many cases will be the truth.

III. SUFFICIENCY OF "TRIGGERMAN" EVIDENCE IS OF GREATEST IMPORTANCE IN VIRGINIA CAPITAL CASES.

Not only does the issue of who caused the death of the victim arise often in Virginia capital cases, it is treated as a matter of utmost importance by the Supreme Court of Virginia, indeed as an exception to the traditional deference afforded to jury fact-finding.

It is well established under Virginia law that, unless a case is one of a killing for hire, "only the person who is the

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17 The reason given for the not guilty verdict on the capital murder charge was the weakness of the evidence adduced to prove that Cressell robbed the victim. *See* VA. CODE ANN. § 18.2-31(4) (Michie 1997).

immediate perpetrator [of the killing] may be a principal in the first degree and thus liable to conviction for capital murder." *Johnson v. Commonwealth*, 220 Va. 146, 150, 255 S.E.2d 525, 527 (1979) (interpreting VA. CODE ANN. § 18.2-18(b) (Michie 1997)). In addition, it has also been established that when a killing is one involving joint participation, both killers may be considered an "immediate perpetrator" or "triggermen" and both may be convicted of capital murder. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1980); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980).

If the death was not caused by joint action, as is the situation in the case at bar, determining who was in fact the "triggerman" is of the utmost importance. That is, of course, appropriate, since it is a matter of life and death. The capital jurisprudence of the Supreme Court of Virginia illustrates the primacy of this issue. With the exception of relief directly mandated by a decision of this Court, the Supreme Court of Virginia has granted relief on direct appeal to death-sentenced prisoners only twice in the last seven years. In both *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990), and *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991), the issue was sufficiency of the triggerman evidence.

In *Cheng*, the victim was shot four times in the head and neck and the defendant was the last person seen with the victim before his death. 240 Va. at 31, 393 S.E.2d at 601. There was evidence that the defendant "'masterminded' the criminal plan", "expressed an intent to commit robbery", "directed his accomplices to obtain a 'sawed-off' shotgun", and had made incriminating statements to the police. 240 Va. at 43, 393 S.E.2d. at 608. A piece of paper containing the defendant's name and address was also discovered in the car in which the victim's body was found. 240 Va. at 32, 393 S.E.2d at 602.

Due to this sizable amount of incriminating evidence against the defendant, a jury convicted him of capital murder. He appealed, contending that the evidence was insufficient to sustain a capital murder conviction, for there was no direct evidence in the record that he was the triggerman. The Supreme Court agreed, reversing Cheng's conviction, and stating that "[t]he evidence was insufficient ...to support the inference that the defendant fired the fatal shots." 240 Va. at 43, 393 S.E.2d at 608. The court continued: "Suspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a conviction." 240 Va. at 42, 393 S.E.2d at 608. In *Cheng*, the Virginia Supreme Court made it clear that it is not easy for the Commonwealth to meet its burden of proving that the one accused of capital murder was the actual perpetrator of the crime beyond a reasonable doubt.

A case even more illustrative of the question before the Court in the case at bar was *Rogers v. Commonwealth*. In *Rogers*, the defendant was convicted of capital murder for brutally attacking, raping, and fatally stabbing a 74 year old woman. 242 Va. at 309, 40 S.E.2d at 622. Police interviewed Troy Malcolm, who apparently admitted that he was present in the victim's home at the time of the crime, but named Rogers as the killer. 242 Va. at 316, 410 S.E.2d at 626. Rogers was immediately arrested and interrogated. He admitted forcible entry into the house, robbing and raping the victim, but denied stabbing her. References by the interrogator to Malcolm's accusations were included as a part of Rogers' confession admitted at his trial. *Id.*[18] Rogers denied ever seeing a knife,

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[18] The interrogations in *Rogers* illustrate another aspect of the unreliability of untested co-defendant statements. The law enforcement officers who take the statements are often uninformed about and sometimes indifferent to the truth. Rogers was interrogated and released twice, the day after the crime and two days later. In the second interview, he implicated Malcolm. Two days later, Malcolm was interviewed and an arrest warrant

and testified that he was the last one to leave the scene because he was scared and had never seen anything like what had been done to the victim. 242 Va. at 316, 410 S.E.2d at 626. Forensic testing done by the Commonwealth's experts was inconclusive. 242 Va. at 317, 410 S.E.2d at 627.

Based upon this evidence, the defendant was convicted and sentenced to death. He appealed, and the Supreme Court, as in *Cheng*, reversed his conviction. In the words of the court:

> Whatever theory offered by the Commonwealth, we hold that the evidence is insufficient, as a matter of law, to prove that defendant actually stabbed the victim, or administered any other blows which caused her death. As we have said, all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence....the Commonwealth has failed to exclude Troy Malcolm [the co-defendant] as the perpetrator.

242 Va. at 319, 410 S.E.2d at 628.

These cases leave no doubt as to the importance of

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charging Rogers with capital murder was issued immediately upon conclusion of the interview. 242 Va. at 314-15, 410 S.E.2d at 625-26. The last of these interrogations was conducted within five days of the commission of the crime. Given that no forensic or other independent evidence pointing to Rogers or Malcolm as the killer was ever adduced, the strong suggestion arises that the police in this case had none at the time of the interrogations and just made a subjective decision about whose story they would believe.

Mark Lilly's hearsay statement.[19] Had it been excluded, as the Confrontation Clause requires, there is more than a reasonable likelihood that Benjamin Lilly would not have been convicted and sentenced to death, or that such conviction and sentence would not have been permitted to stand. To paraphrase the *Rogers* court, the Commonwealth has failed to exclude Mark Lilly and Gary Wayne Barker as triggermen, and has not established beyond a reasonable doubt that Benjamin Lilly in fact caused the death of the victim.

CONCLUSION

This Court in *Williamson* resolved the question now before it correctly on statutory grounds. There are no legitimate reasons for this Court to establish a less stringent Confrontation Clause standard. There are many reasons, however, that the standards should be the same on this point. They include (1) the fundamental importance of confrontation and cross-examination; (2) a comparison of the policy underlying recognition of the hearsay exception with the self-serving nature of the statement at issue here; (3) the negative practical impact on truth-finding of licensing prosecutors to shield unreliable witnesses from juries; (4) the similar impact of signaling to law enforcement officers that they may engage in interrogation techniques without meaningful concern for the truth; and (5) Benjamin Lilly's right not to be deprived of his life without due process.

For the foregoing reasons, *amici* urge this Court to

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19 *Amici* have not briefed the question of whether factors other than the circumstances of Mark Lilly's hearsay statement may be considered in the determination of its admissibility. On that point, *amici* adopt and support the position of petitioner that, under this Court's precedent, they may not.

reverse Lilly's conviction and remand the case for a new trial..

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF VIRGINIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA, IN SUPPORT OF PETITIONER

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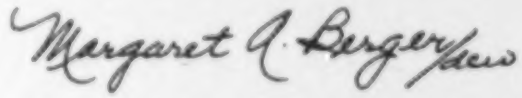
MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b), the American Civil Liberties Union (ACLU) and the ACLU of Virginia respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has granted consent, but respondent has refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

This case raises important questions about the meaning of the Confrontation Clause, which has been a vital ingredient of the fair trial right for hundreds of years. In particular, this case presents the Court with an opportunity to reconsider the relationship between the Confrontation Clause and the law of hearsay. Because we believe the Confrontation Clause has too often been treated as little more than a constitutional analog of the hearsay rules, thus undervaluing its significance in our constitutional scheme, we respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,



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Dated: December 21, 1998

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INTEREST OF *AMICI* [1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

The petitioner, Benjamin Lilly, was convicted in the Virginia Circuit Court of the capital murder of a student during a car-jacking. The trial court entered judgment on the jury's verdict on March 7, 1997, and imposed the death sentence recommended by the jury. The Virginia Supreme Court affirmed the conviction and the sentence on April 17, 1998, in *Lilly v. Commonwealth*, 499 S.E.2d 522 (Va. 1998).

With petitioner at the time of the shooting were Gary Wayne Barker and petitioner's brother, Mark Lilly. At petitioner's trial, Barker, who had been allowed to plead guilty and to avoid the death penalty, testified against him; Mark Lilly, who had not been tried or allowed to plead, invoked his privilege against self-incrimination. The court then admitted the in-custody confession given by Mark Lilly to the police in which he named his brother as the triggerman. Mark Lilly was subsequently permitted to plead guilty to noncapital murder, and recanted portions of his confession at petitioner's sentencing.

On appeal, the Virginia Supreme Court held that Mark Lilly's in-custody confession had been properly admitted as a statement against interest under a "firmly rooted" Virginia hearsay exception, and that the confession therefore satisfied the Confrontation Clause. *Id.* at 534.

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to restore the Confrontation Clause to its proper place as one of the fundamental guarantees protected by the Constitution, one with deep roots in the Anglo-American tradition and, indeed, throughout Western jurisprudence. Decisions of this Court have tended to merge the confrontation right with the ordinary law of hearsay, perceiving both as principally guarantors of the reliability of evidence. This approach, we submit, has not worked. It denigrates the confrontation right and the fundamental sense of procedural fairness that the right protects. It ignores the language of the Clause, the history of the right, and the role of the right in the Sixth Amendment. It provides insufficient guidance and affords too much discretion to lower courts in interpreting the Confrontation Clause. It simultaneously leads to overly rigid hearsay law. The price to our system of justice is exemplified by intolerable results such as the one reached by the court below in this case.

We believe that it is necessary to break the link between confrontation and hearsay, both so that a robust understanding of the confrontation right can be developed and so that ordinary hearsay law will not be confused by an imposed correspondence with a right that has been inadequately articulated. A majority of this Court, in *White v. Illinois*, 502 U.S. 346, 353 (1992), rejected a proposal by the Government to uncouple the Confrontation Clause from the hearsay rule as an "argument . . . [that] comes too late in the day," but that conclusion was apparently based primarily on the Court's concern that the Government's reading of the Clause "would virtually eliminate its role in restricting the admission of hearsay testimony." *Id.* at 352. By contrast, the approach we present here would reinvigorate the Clause, giving it force independent of hearsay law. At the same time, though our approach is markedly different analytically from the current doctrine, the results of our approach would, at least for the most part, square with those reached in the Court's decisions.

The most crucial step in achieving a better sense of the Confrontation Clause is recognizing its unique purpose. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The concerns that led to the Confrontation Clause predate modern hearsay law. Two consequences flow from this acknowledgement. First, if a declarant is acting as a witness -- whether in or out of court -- the Clause undeniably applies and violations of its core principles cannot be excused on the basis of hearsay exceptions. Second, not every hearsay declaration raises a Confrontation Clause issue. *See White v. Illinois*, 502 U.S. at 358 (Thomas and Scalia, JJ., partially concurring). Within its proper realm, we believe the Confrontation Clause states a simple and categorical rule, which is central to the Anglo-American conception of justice: the accused has a right to confront all adverse witnesses. This means, at the very least, the right to cross-examine the witness under oath.

We will present in this brief some varying understandings of what the term "witnesses" should be understood to mean in the Clause. Formulating a precise definition is not a simple matter, but under any plausible definition Mark Lilly was acting as a witness within the meaning of the Clause when he made the crucial accusation in this case. The admission of such statements sets up, in effect, an inquisitorial system in which prosecutors are free to take unsworn statements from witnesses behind closed doors, out of the presence of the accused or of counsel, who are given no opportunity for cross-examination, and then use those statements to convict a defendant -- all because of the courts' perception that such testimony is trustworthy. This practice was recognized to be unacceptable long before the Confrontation Clause was adopted, and it is at the very core of what

the Clause was meant to prevent. Just as the rights to trial by jury and to counsel are not qualified by the court's evaluation of the merits of the case, the right to confront the witness is not qualified by the court's evaluation of the accuracy of the witness's statement.

ARGUMENT

I. ANGLO-AMERICAN TRADITIONS, CIVILIZED PRACTICE, AND THE STRUCTURE OF THE SIXTH AMENDMENT CALL FOR A CATEGORICAL RIGHT TO CONFRONTATION INDEPENDENT OF THE HEARSAY DOCTRINE

The right of an accused to confront the witnesses against him predates, and is independent of, the law of hearsay. It has received its fullest development within the Anglo-American tradition, but it has also been a critical feature of other judicial systems, which have nothing resembling our law of hearsay. The history and broad recognition of the confrontation right demonstrate that it is not an adjunct of, or an attempt to constitutionalize, the law of hearsay. Rather, it is a fundamental and categorical rule as to how the testimony of witnesses should be taken.

A. The Right To Confrontation Has A Long History That Antedates The Hearsay Rule

1. Early Roots

The ancient Hebrews required accusing witnesses to give their testimony in front of the accused. Deut. 19:15-18. And so did the Romans.[2] When medieval Continental

[2] The Book of Acts quotes the Roman Governor Festus as saying: "It is (continued...)

systems began to rely on the testimony of witnesses, they allowed the parties to examine the witnesses -- but on written questions.[3] These systems took the testimony behind closed doors, for fear that witnesses would be coached or intimidated.

By contrast, the open and confrontational way in which testimony was taken was the most critical characteristic of the common law trial. In the middle of the 16th century, Sir Thomas Smith wrote a well-known account of a typical English criminal trial, which he described as an "altercation" between the accusing witness and the accused. DE REPUBLICA ANGLORUM 74 (Mary Dewar ed. 1982). Beginning nearly a century before Smith wrote, and continuing for centuries afterwards, numerous English judges and commentators praised the open and confrontational nature of the English trial in contrast to its Continental counterpart.[4]

For example, Sir Matthew Hale lauded the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council" in English procedure. Among other advantages, this procedure allowed "Opportu-

[2] (...continued)
not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16, quoted in *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988); *Greene v. McElroy*, 360 U.S. 474, 497 (1959). The NEW ENGLISH BIBLE (2d ed. 1970) translates the key passage as "before he is confronted with his accusers."

[3] C. van Caenegem, HISTORY OF EUROPEAN CIVIL PROCEDURE, in 16 INT'L ENCYC. OF COMP. L., ch.2 (Civil Procedure), at 19, 58-59, 62 (c. 1972).

[4] Around 1470, even before the roles of witnesses and juries were clearly distinguished, Sir John Fortescue praised the openness of the English system in contrast to that of the civil law. "In Praise of the Laws of England," in ON THE LAWS AND GOVERNANCE OF ENGLAND 38-39 (Shelley Lockwood ed. 1997).

nity for all Persons concern'd" to question the witness and "Opportunity of confronting the adverse Witnesses."[5] In a passage closely following Hale, Blackstone articulated many of the same advantages -- including "the confronting of adverse witnesses" -- of "the English[] way of giving testimony, ore tenus."[6]

Thus, by 1696, in the celebrated case of *R. v. Paine*, it was clearly established that, even if a witness had died, his statement made to a justice of the peace could not be admitted against a misdemeanor defendant because the defendant was not present when the examination was taken and so "could not cross-examine" the deponent.[7]

To be sure, the norm of confrontation was not always respected. First *Paine* itself distinguished felony cases. Since the mid-sixteenth century, justices of the peace had been required to examine felony witnesses, and these examinations were admissible at trial *if* the witness was then unavailable and the examination was taken under oath. John H. Langbein, PROSECUTING CRIME IN THE RENAISSANCE 27-

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[5] THE HISTORY OF THE COMMON LAW OF ENGLAND 163-64 (written between 1660 and 1676; Charles M. Gray ed. 1971).

[6] 3 W. Blackstone, COMMENTARIES at *373. Hale and Blackstone spoke of "confronting" one witness against another. Similarly, in 1730, Sollon Emlyn, in the Preface to his monumental collection, STATE TRIALS, at iii-iv, emphasized the "Excellency" of English criminal procedure. "In other Countries," he wrote, "the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them . . . ." Also, in the *Case of the Union of the Realms*, Moore (K.B.) 790, 798, 72 E.R. 908, 913 (1604), Lord Chief Justice Popham, arguing for the superiority of English over Scots law, contended that "the Testimonies, being viva voce before the Judges in open face of the world" was "much to be preferred" over "written depositions in a corner."

[7] 1 Salk. 281, 91 E.R. 246, 1 Ld. Raym. 729, 91 E.R. 1387, 5 Mod. 161, 87 E.R. 584, Holt 294, 90 E.R. 1062, Comb. 358, 90 E.R. 527.

29 (1974). This anomalously lenient treatment -- which was probably one of the abuses at which the Confrontation Clause was aimed -- was controversial by the early seventeenth century, *see R. v. Westbeer*, 1 Leach 12, 13, 168 E.R. 108, 109 (1739), and it was eliminated by statute in the nineteenth century. Stats. 11 & 12 Vict. ch.42 §17 (1848).

Second, a set of courts in England, including the equity courts, followed the Continental system rather than the common law, relying largely on testimony taken out of court and out of the presence of the parties.[8] These courts appeared to be arms of unlimited royal power, and so many of them, notably the court of Star Chamber, did not survive the upheavals of the seventeenth century. THE STUART CONSTITUTION 106 (J.P. Kenyon ed., 2d ed. 1986).

Third, the Crown, eager to use the criminal law as a means of controlling its adversaries, sometimes used testimony taken out of the presence of the accused. Thus, it is in the treason cases of Tudor and Stuart England that we find the battle for the confrontation right most clearly fought.

As early as 1521, treason defendants, often using the term "face to face," demanded that the witnesses be brought before them.[9] Sometimes these demands were heeded,[10]

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[8] *See, e.g.*, William Hudson, A TREATISE OF THE COURT OF STAR CHAMBER 204 (Francis Hargrave ed. 1792; repr. 1986). The equity courts did, however, carefully preserve the ability of the parties to examine adverse witnesses, albeit on written questions. *See, e.g., Rushworth v. Countess de Pembroke & Currier*, Hardres 472, 145 E.R. 553 (1668).

[9] *E.g., Seymour's Case*, 1 How.St.Tr. 483, 492 (1549); *Duke of Somerset's Trial*, 1 How.St.Tr. 515, 520 (1551).

[10] According to Edward Hall, THE UNION OF THE TWO NOBLE AND ILLUSTRE FAMELIES OF LANCASTRE & YORKE (1548), published under the title HALL'S CHRONICLE (1809), p.623, the witnesses against the Duke of Buckingham in 1521 were produced at his request. Hall's account of

(continued...)

sometimes not -- but what is most notable is that they found recurrent support in acts of Parliament, which repeatedly required that accusing witnesses be brought "face to face" with the defendant.[11] By the middle of the seventeenth century, the battle was won, and courts clearly understood that treason witnesses must testify before the accused, subject to questioning by the accused.[12]

Well into that century, prosecutorial authorities often tried to use confessions of alleged accomplices of the accused that were not made according to the usual norms of

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[10] (...continued)
Buckingham's trial appears to be the ultimate source for the one offered by Shakespeare and Fletcher in King Henry VIII, II:1.

John Spelman, a judge of the King's Bench, was careful to note in his report of a treason trial of 1531 that the accuser confronted the defendant "face to face." *R. v. Rice ap Griffith*, in 1 J.H. Baker, ed., "The Reports of Sir John Spelman," 93 PUBLICATIONS OF THE SELDEN SOCIETY (1976).

[11] Stats. 5 & 6 Edw.6, ch.11, §9 (1552), and 1 & 2 Phil.& M., ch.10, §11 (1554), required witnesses to be "brought forth in person" before the accused. Stats. 1 Eliz.1, ch.1, §21 (1558), 1 Eliz.1, ch.5, §10 (1558), 13 Eliz.1, ch.1, §9 (1571), and 13 Car.2, ch.1, §5 (1661), all used the "face to face" formulation.

[12] For example, in the celebrated case of John Lilburne in 1649, there was no doubt that the witnesses would testify live in front of Lilburne; "hear what the witnesses say first," said the presiding judge in postponing one of Lilburne's arguments. 4 How.St.Tr. 1270, 1329. When the witnesses did testify, Lilburne was allowed to pose questions to them, through the court. *Id.* at 1333, 1334, 1335, 1340. In *John Mordant's Case*, just nine years later, there does not seem to have been any doubt that he could question the witnesses directly, which he did, 5 How.St.Tr. 907, 919-21. Indeed, at one point the presiding judge solicitously inquired whether Mordant wished to ask a witness any questions, *id.* at 922, a practice that soon became routine. *E.g., Colledge's Case*, 8 How.St.Tr. 549, 599, 603, 606 (1681).

testimony, under oath and before the accused. The case of Sir Walter Raleigh is the most notorious, but far from the only one. The theory -- remarkably similar to the one adopted by the lower court in this case -- was that self-accusation was "as strong as if upon oath."[13] But the judges soon realized the iniquity of allowing an exception to the usual norms of testimony simply because the accomplice accused himself as well as another.[14]

In 1662, shortly after the Restoration, the judges of the King's Bench ruled unanimously and definitively that, though a pretrial confession was "evidence against the Party himself who made the Confession" and, if adequately proved could indeed support conviction of that person without witnesses to the treason itself, the confession "cannot be used as evidence against any others whom on his Examination he confessed to be in the Treason."[15] This fundamental principle[16] seems never since to have been seriously challenged until recently -- in cases like the current one.[17]

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[13] *Earl of Somerset's Case*, 2 How.St.Tr. 966, 986 (1616)(Coke, C.J.).

[14] In 1631, the judges concluded that, at the trial of a peer before the House of Lords, "[c]ertain Examinations [clearly confessions from the context] having been taken by the lords without an oath . . . could not be used until they were repeated upon oath." *Lord Audley's Case*, 3 How.St.Tr. 401, 402 (1631).

[15] *Case of Thomas Tong and Others*, Kelyng 17, 18, 84 E.R. 1061, 1062 (1662).

[16] For important early endorsements of this principle, *see* Geoffrey Gilbert, THE LAW OF EVIDENCE 99 (1754); 2 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 429 (1721).

[17] *See Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1990), *cert. denied*, 502 U.S. 1121 (1992); *State v. Earnest*, 106 N.M. 41, 744 P.2d 539, *cert. denied*, 484 U.S. 924 (1987)(confessions of murder coconspirators who at defendants' trials asserted privilege against self-
(continued...)

2. The History Of Confrontation In America

The confrontation right naturally found its way to America.[18] Thus, a Massachusetts statute of 1647 provided that "in all capital cases all witnesses shall be present wheresoever they dwell."[19] But the Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.[20] In addition, the right became especially relevant to American concerns when Parliament began in the 1760's to regulate the colonists through inquisitorial means like the Stamp Act, which provided for the examination of witnesses upon interrogatories.[21] It is clear that the Framers were aware of the abuses in the sixteenth and seventeenth century treason trials and of the defendants' demands for meeting their accusers "face to face."[22] They knew as well about the procedural reforms achieved by the Glorious Revolution, which included requiring treason to be proved through the testimony of two trial witnesses.

In the Revolutionary period the right to confrontation was frequently expressed, especially in the early state constitutions: Some used the time-honored "face to face" phrase;[23] others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Confrontation Clause of the Sixth Amendment.[24]

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[17] (...continued)
incrimination admitted, as in this case, on grounds of presumed reliability).

[18] This importation was no doubt aided, especially towards the end of the seventeenth century, by the arrival of substantial numbers of lawyers who had been trained at the Inns of Court "and brought with them, applied, and enforced the procedural modifications enacted in England after the Revolution of 1688." Francis H. Heller, THE SIXTH AMENDMENT 20 (1969). *See also* Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-31 (1967).

[19] BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS 54 (Cambridge 1648), in 1 LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691 60 (John D. Cushing ed. 1975). The same statute provided that in other cases the testimony of a witness might be taken by a magistrate or a commissioner, b that if the witness lived within ten miles of the court and was not disabled, this pretrial statement "shall not be received, or made use of in the Court, except the witnes be also present to be farther examined about it."

[20] *See* Randolph N. Jonakait, "The Origins of the Confrontation Clause: An Alternative History," 27 Rutgers L.J. 77 (1995).

[21] *See generally* Murl A. Larkin, "The Right of Confrontation: What Next?", 1 Tex.Tech.L.Rev. 67 (1969).

[22] They had access to the reports of the state treason trials first published in 1719 (Symposium, "Historical Development of the American Lawyer's Library," 61 L.Libr.J. 440, 444 (1968)), standard treatises such as Gilbert's and Hale's that relied heavily on the state trials, and they read and revered Blackstone. *See* L. M. Friedman, A HISTORY OF AMERICAN LAW 101 (2d. ed. 1985).

[23] *E.g.*, Mass. Const., pt. I, art. XII (1780), in Richard L. Perry, SOURCES OF OUR LIBERTIES (1955), at 376 (right of accused "to meet the witnesses against him face to face"); N.H. Const., pt. I, art. XV (1784), *id.* at 384 (identical language).

[24] *See* Md. Const. §19 (1776), in Perry, SOURCES, at 348, providing that "in all criminal prosecutions, a man hath a right . . . to be confronted with the witnesses against him." *See also* Va. Const. §8 (1776), *id.* at 312 ("a right . . . to be confronted with the accusers and witnesses"); N.C. Const. §7 (1776), *id.* at 355 ("a right . . . to confront the accusers and witnesses with other testimony"); Pa. Const. §9 (1776), *id.* at 330 ("a right . . . to be confronted with the witnesses"); Vt. Const. §10 (1777), *id.* at 366 (identical language).

3. The History Of Confrontation Was Unrelated To The Evolution Of The Hearsay Doctrine

Note that in this account of the background of the Confrontation Clause, we have not mentioned reliability. To be sure, one of the advantages perceived by those who lauded the common law system of open confrontation of witnesses was its contribution to truth-determination.[25] But neither in the statutes, nor in the case law, nor in the commentary was there a suggestion that, if the courts determined that a particular item or type of testimony was reliable, then the accused lost his right of confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken.

Similarly, the law against hearsay has not played a role in this account. It could not have: Hearsay doctrine, like evidentiary law more generally, was not well developed even at the time the Clause was adopted, much less during the previous centuries. As late as 1794, Edmund Burke remarked in the House of Commons that the rules of "the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in

[25] Hale, for example, argued that cross-examination "beats and boults out the Truth much better" than privately taken examinations with "limited . . . Interrogatories in Writing." HISTORY OF THE COMMON LAW, at 164. Similarly, Blackstone contended, "This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing" in the manner of the civil law. 3 COMMENTARIES *373.

five minutes."[26] The tendency to meld the confrontation right and hearsay is a latter-day development. It likely reflects the influence of Wigmore, who subordinated the confrontation right to hearsay.[27] More recent commentators regard Wigmore's view as anachronistic because their research teaches that the hearsay rule evolved in both England and America considerably later than Wigmore claimed.[28]

It is noteworthy that the word hearsay appears neither in *Mattox v. United States*, 156 U.S. 237 (1895), the first of several cases to note that the "primary object" of the Clause was to prevent the use of testimony taken *ex parte*, *id.* at 242, nor in *Pointer v. Texas*, 380 U.S. 400 (1965), which held that the Clause expresses a fundamental right applicable against the states. As its language plainly indicates, the Clause was not an attempt to constitutionalize the nascent law of hearsay.[29] Rather, it plainly expressed the fundamental principle that if a person acts as a witness against an accused, the accused must have an opportunity to confront that person.

[26] Quoted in John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," 96 Col.L.Rev. 1168, 1186-1190 (1996); *see also, e.g.*, Robert P. Mosteller, "Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions," 1993 Ill.L.Rev. 691.

[27] *See* 5 Wigmore, EVIDENCE ch.47 (Chadbourn rev. 1974)("The Hearsay Rule Satisfied by Confrontation").

[28] *See generally* Stephen Landsman, "From *Gilbert* to *Bentham*: The Reconceptualization of Evidence Theory," 36 Wayne L.Rev. 1149 (1990); John H. Langbein, "The Criminal Trial Before Lawyers," 45 U. Chi.L.Rev. 263 (1978).

[29] Indeed, Justice Story faulted the drafters of the Sixth Amendment for failing to incorporate the law of evidence into the Sixth Amendment even while showing "undue solicitude" for procedural protections. Joseph Story, COMMENTARIES ON THE CONSTITUTION (1833)(1991 ed.).

4. The Court's View That Confrontation Only Seeks To Promote Accuracy In Factfinding Is Contrary To The Structure Of The Sixth Amendment

Our historical discussion has shown that evidentiary concerns were not a significant factor in adoption of the Confrontation Clause. Rather, the Clause was meant to protect a categorical procedural right that, like the right to counsel, was in place by the time the Bill of Rights was adopted. This conclusion is fortified by the placement of the Clause in the Sixth Amendment.

If one looks at the grand design of the Sixth Amendment, in accordance with ordinary canons of statutory analysis that construe a provision as a harmonious whole,[30] one sees a bundle of procedural protections for a criminal defendant that have more than accuracy in factfinding at their core. The right to counsel is recognized as fundamental even if it interferes with factfinding in a particular case. *See Massiah v. United States*, 377 U.S. 201 (1964)(excluding defendant's incriminating statements that had been obtained in violation of the right to counsel; the dissent objected to the Court's erection of "additional barriers to the pursuit of truth," *id.* at 208). And the right to a jury trial is not suspended because a judge may be more capable than jurors of correctly evaluating complicated expert testimony, such as competing statistical analyses of the significance of DNA evidence. Nor has the interpretation of the Compulsory Process Clause turned solely on "accuracy in factfinding." *See Rock v. Arkansas*, 483 U.S. 44 (1987)(relying in part on the Compulsory Process Clause to hold unconstitutional a

[30] *See* 2a N.J. Singer, SUTHERLAND STATUTORY CONSTRUCTION §46.05, at 103 (C. Dallas Sands 5th ed. 1992).

state rule purportedly "designed to ensure trustworthy testimony").

Only the Confrontation Clause has of late been stripped of any role other than furthering evidentiary objectives. We urge the Court to recognize that this interpretation ignores significant values at the core of the right to confrontation, and leads to intolerable results that cannot be adequately policed by the Court.

B. A Confrontation Right Is Recognized In Modern Europe

This perspective is borne out by recent developments under the European Convention on Human Rights. That Convention contains nothing resembling a hearsay rule, of course, because most of the judicial systems falling under it do not have hearsay law. But Articles 6(1) and 6(3)(d) of the Convention contain, respectively, a general protection of a criminal defendant's right to a fair trial and a specific protection of his right "to examine or have examined witnesses against him." Under these provisions, the European Court of Human Rights has issued a series of decisions establishing a right of confrontation, which it has referred to as such.[31]

Thus, the court has repeatedly held that defendants' confrontation rights were violated by the use at trial of statements made before trial to investigative or prosecutorial

[31] *E.g.*, *Saïdi v. France*, 17 E.H.R.R. 251, 270 (1993)("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial"). *See also Van Mechelen v. Netherlands*, 25 E.H.R.R. 647, 673 (1997); *Lüdi v. Switzerland*, 15 E.H.R.R. 173 (1992); *Windisch v. Austria*, 13 E.H.R.R. 281 (1991); *Delta v. France*, 16 E.H.R.R. 574 (190); *Kostovski v. Netherlands*, 12 E.H.R.R. 434, 448-49 (1989).

authorities, where the defendant had no opportunity to examine the witness. And the English Court of Appeal has recently relied on the same provisions of the Convention in reaching a similar conclusion.[32]

We thus face the great irony that the confrontation right, one of the great glories of the Anglo-American system of criminal procedure, is now receiving its clearest articulation in decisions by and following a Continental court. The reasons are clear enough: The Europeans are unencumbered by the peculiar hearsay doctrine of the common law tradition. They recognize that confrontation is a categorical rule that expresses a fundamental human right.

II. A CATEGORICAL RIGHT OF CONFRONTATION WOULD YIELD MORE CONSTANT RESULTS, ELIMINATE THE COURTS' NEED TO EVALUATE TRUSTWORTHINESS IN APPLYING THE SIXTH AMENDMENT, AND PERMIT THE CONTINUING DEVELOPMENT OF THE HEARSAY RULE WITHOUT REQUIRING THE OVERRULING OF PRIOR PRECEDENTS OF THE COURT

A. The Court's Current Approach To Confrontation Produces Intolerable Results, As Illustrated By The Case Below

The Court has declared an exact fit between the hearsay rule and the Confrontation Clause when the out-of-court statement satisfies a "firmly rooted" hearsay exception. *United States v. Inadi*, 475 U.S. 387 (1986); *White*, 502 U.S. at 357 ("a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability"). This formula, which masquerades as a categorical rule that results in consistent interpretations of a basic constitutional right, instead gives lower courts enormous leeway to admit hearsay against a criminal defendant, subject to correction only in the rare instance in which this Court grants *certiorari*.

The test to be used in determining when an exception is "firmly rooted" is far from clear. In *White*, the Court affirmed the Illinois court's admission of statements made in the course of receiving medical care that identified the defendant as having sexually abused a four-year-old child. The Court justified its conclusion that such statements are "firmly rooted" by noting that a hearsay exception for such statements is recognized in the Federal Rules of Evidence, and "widely accepted among the states." 502 U.S. at 356 n.8. But before the Federal Rules' enactment in 1975, the exception generally did not include statements such as the one involved in *White*, describing an injury's cause, even if relevant to diagnosis or treatment. Moreover, numerous post-*White* courts have admitted statements under cover of the exception and over Confrontation Clause objections even though the trustworthiness rationale of the exception was not satisfied because the declarant was too young to appreciate that "the efficacy of her medical treatment depends upon the accuracy of the information provided to the doctor."[33]

On the other hand, in *Lee v. Illinois*, 476 U.S. 530 (1986), this Court held that the Illinois courts had erred in

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[32] *R. v. Radak*, The Times (London), Oct. 7, 1998.

[33] *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995)(on remand)(Holloway, J., dissenting in part and finding no guarantee of trustworthiness under the circumstances of the case). *See also United States v. Joe*, 8 F.3d 1488, 1494, n.5 (10th Cir. 1993)(noting split in federal circuits on this issue), *cert. denied*, 510 U.S. 1184 (1994).

admitting an accomplice's confession against his codefendant. The majority rejected the state's "characterization of the hearsay involved . . . as a simple 'declaration against penal interest,'" explaining that "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." *Id.* at 544 n.5. Consequently, the confession was not automatically admissible as "firmly rooted," even though the Federal Rules, and numerous state codifications, had expanded the hearsay exception for declarations against interest to encompass statements against penal interest.

Viewed together, *White* and *Lee* lead to circular reasoning. *White* indicates that when a state proffers a statement that fits within an exception that is "firmly rooted" -- *i.e.*, widely accepted by the states for some time, and present in the Federal Rules -- trustworthiness can be inferred. Thus, the need for confrontation disappears -- even if the exception was extended by the Rules themselves beyond prior law and even if the particular application is poorly grounded in the rationale of the exception. *Lee* says that an inherently untrustworthy statement cannot be automatically admitted as "firmly rooted" even if the exception under which it is offered has been generally accepted for a while, and is incorporated in the Federal Rules. Taken together, these cases beg the question of how a court should respond when reviewing evidence proffered under a refashioned traditional class exception, or a nontraditional class exception, that has been accepted for some period of time in its jurisdiction and others.

The default test of "particularized guarantees of trustworthiness," which applies when an exception is not firmly rooted, also fails to offer sufficient guidance or to protect a defendant adequately, as this case illustrates. Nothing in the actual holding of *Lee* bars a court from admitting an accomplice confession, such as the statement in this case, if it concludes that the particular confession is sufficiently

reliable.[34] So long as the Court retains its trustworthiness view of confrontation, and does not abandon *Lee* in favor of a *per se* rule that certain kinds of confessions never satisfy the Confrontation Clause, courts will continue to have enormous, virtually unreviewable, discretion in determining trustworthiness on a case-by-case basis.

The facts of this case demonstrate the amorphous nature of a trustworthiness inquiry. True, Mark Lilly admitted to participation in a series of crimes. But the "totality of circumstances that surround the making of the statement," *see Idaho v. Wright*, 497 U.S. 805, 820 (1990), raises numerous factors -- which we assume petitioner will present to this Court -- that might plausibly account for Mark Lilly falsely incriminating his brother.

It cannot be fair to deprive a defendant of the ancient right to face his accuser because a judge mixes some dubious generalizations about human behavior -- such as that one is unlikely to make a statement confessing a crime unless the entirety of the statement is substantially true, or that brothers would not falsely incriminate each other -- with his own view of the surrounding facts to conclude that the statement is probably true.[35] Hearsay exceptions may hinge on

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[34] Although this Court has held that only the self-inculpatory portion of a declaration against penal interest satisfies the rationale of Fed.R.Evid. 804(b)(3), the decision in *Williamson v. United States*, 512 U.S. 594, 600 (1994), acknowledges that "Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpating statements." Virginia, is of course, free to make the same choice, subject to the same condition.

[35] The situation would not be helped if, *contra* to *Wright*, the Court allowed corroborating evidence to play a role in the determination of trustworthiness. First, such a test would increase the bounds of trial court discretion. Second, corroborating evidence, like the testimony of Barker in this case, is often itself highly suspect. Third, such an approach turns the Confrontation Clause test, for all practical purposes, into the question: Does the judge think the defendant is guilty?

such cliches, but a defendant should have the right to challenge his accuser in the courtroom when the out-of-court statement falls within the perimeter of core values on which the Sixth Amendment right of confrontation rests.

Neither the "firmly rooted" test nor the requirement of "particularized guarantees of trustworthiness" provides a satisfactory test of confrontation that guides the lower courts or ensures that a defendant is accorded the procedural protection guaranteed by the Sixth Amendment.

B. A Categorical Approach Would Exclude In-Custody Confessions Unless The Defendant Was Afforded His Right Of Confrontation

Our arguments indicate that the constitutional right of confrontation is independent of, and should not be made subordinate to, the ordinary law of hearsay. We contend that applicability of the Confrontation Clause to an out-of-court statement does not depend on a court's assessment of the statement's reliability. Rather, the Clause states a fundamental procedural protection, and applies categorically to certain types of statements.[36] In this section, we will present two proposals for defining that category of statements. While we urge the Court to declare that such a categorical right exists, we do not believe that to decide this case the Court must choose one of these variants, or any other particular proposal, or that it must define the boundaries of the Clause with precision. Under *any* reasonable demarcation of the category of statements covered by the Clause, accomplice confessions like the one here of Mark Lilly lie at the heart of the Clause, and nowhere near the edge.

[36] One aspect of a categorical rule is that, if a statement is of the defined type and the accused has not had an opportunity to confront the witness, use of the statement at trial is, at least in general, unacceptable even if the witness is then unavailable. This treatment of unavailability and the question (which the Court need not reach for purposes of this case) of whether qualifications to it are appropriate, are discussed briefly below in n.47.

1. A Testimonial View

Under one approach, the key question is this: In making the statement at issue, should the declarant be deemed to have been acting *as a witness* within the meaning of the Confrontation Clause? If not, then under this approach the Clause does not apply. On the other hand, if the declarant was acting as a witness, and the accused has not had an adequate opportunity to confront her, then the statement may not be admitted against the accused (unless he has forfeited the confrontation right by causing the witness's unavailability). *See, e.g.*, Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 125-31 (1997); Richard D. Friedman, "Confrontation: The Search for Basic Principles," 86 Geo. L.J. 1011, 1022-26 (1998).

This view finds obvious support in the language of the Confrontation Clause -- which speaks in unqualified terms of the accused's right to confront "the witnesses against" the accused. It is supported also by the history of the Clause and in its manifest role in our system of criminal procedure. As we have shown, the Clause constitutionalizes a long-established procedural rule governing the manner by which witnesses give testimony for adjudication in the Anglo-American system, a manner far different from the inquisitorial style used by Continental courts.

When, then, should a declarant be deemed to have acted as a witness in making a statement against an accused? Put another way, when is her statement testimonial? Obviously, she acts as a witness if she testifies in court, at the trial of

the defendant; the defendant then has a right to be present at the trial and cross-examine her. It is hardly less obvious that the declarant is acting as a witness if she gives the prosecution an affidavit, or otherwise makes a formal pre-trial statement under oath about the alleged crime to the authorities.[37] Indeed, it has often been said that *ex parte* affidavits and other "formalized testimonial materials" were the focus of the Confrontation Clause. *White v. Illinois*, 502 U.S. at 365 (Thomas and Scalia, JJ., partially concurring); *Mattox v. United States*, 156 U.S. at 242-43.

Justices Scalia and Thomas explicitly included "confessions" in the category of "formalized testimonial materials." Thus, their analysis would -- properly -- bring statements like Mark Lilly's in this case within the ambit of the Confrontation Clause. A better and less strained approach to the same result, we suggest, is to recognize that formality is not a prerequisite to deeming a statement testimonial, and so bringing it within that ambit. Rather, formality is a necessary but not sufficient condition for making testimony *acceptable*. In particular, the oath is perhaps the oldest and most nearly universal requirement for the giving of testimony. *See generally, e.g.*, Helen Silving, "The Oath: I," 68 Yale L.J. 1329 (1959). If unsworn confessions to the authorities were not deemed to be statements within the protection of the Confrontation Clause, then we would have a

[37] Statements made at a grand jury proceeding therefore should not be usable at trial unless the declarant testifies and is subject to cross-examination. This rule would eliminate the current practice of subjecting grand jury statements to a "particularized guarantees of trustworthiness" analysis when they are offered under a residual hearsay exception. *See, e.g., United States v. Gomez-Lemos*, 939 F.2d 326, 332-33 (6th Cir. 1991), quoting *Wright*, 497 U.S. at 816.

system in which the authorities could take statements for use at trial, made by declarants knowing they would be so used -- testimony in any real sense of the word -- absent not only confrontation but also the basic protection of the oath; indeed, the authorities would have an *incentive* to take the statement without the oath, simply so that the Confrontation Clause could not be invoked. Thus, it appears that statements made knowingly, even informally, to the authorities investigating a crime should be considered testimonial and so within the coverage of the Confrontation Clause.

In short, under the testimonial approach, this is an easy case. Mark Lilly's custodial confession lies at the core of the Confrontation Case, not near its fringes.

2. A Prosecutorial Restraint View

A somewhat different focus rephrases the key question to ask whether *the government participated* in making the declarant a witness against the defendant.[38] This approach views the Confrontation Clause as integral to a central objective of the Bill of Rights -- to restrain the capricious use of governmental power.[39] The colonists were well aware that the criminal law is a powerful tool in controlling perceived enemies of the state, and knew of the potency and secrecy with which a government can act. To counter these dangers, out-of-court statements procured by the prosecution

[38] *See* Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn.L.Rev. 557 (1992); Roger W. Kirst, "The Procedural Dimensions of Confrontation Doctrine," 66 Neb.L.Rev. 485 (1987).

[39] *See* THE FEDERALIST No. 51, at 323 (James Madison)(Clinton Rossiter ed. 1961)("guard . . . society against the oppression of its rulers").

or police, or their agents, should stand on a different footing than statements obtained without governmental intrusion. Requiring confrontation when the prosecution has played a part in producing the evidence enables the public to scrutinize the process by which the government is exercising its power, and complements the other rights that the Sixth Amendment grants -- trial by jury, a public trial, specification of the charges, and right to counsel.

Under this approach, confrontation protects the defendant against statements that the government might elicit through its enormous power to coerce or induce. If confrontation is not required, the government has the huge advantage of choosing whether to offer the contents of the statement through the testimony of the often discreditable declarant, or through the testimony of a presumptively upright person involved in law enforcement (assuming a hearsay exception otherwise applies).

There may be instances in which the prosecutorial restraint model might yield a different result than the testimonial approach.[40] But this is not such a case. Mark Lilly's in-custody statement to the police falls squarely within the ambit of the confrontation right a prosecutorial restraint approach would grant.

[40] A statement that is deliberately elicited by a law enforcement agent during a covert instigation, from a declarant who is unaware that her statement was being solicited for use in investigation and trial, falls within the prosecutorial restraint view of the coverage of the Confrontation Clause, as the statement is created through active government participation. *See* Margaret A. Berger, "The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model," 76 Minn.L.Rev. at 608-09. It might arguably also be considered testimonial. But this issue, too, need not be reached: Mark Lilly knew he was speaking to the authorities.

C. A Categorical Approach Is Consistent With The Results Reached By The Court In Its Prior Decisions

Plainly, the approach to the Confrontation Clause that we suggest and the doctrine enunciated by the Court are different analytically. Our approach is, however, consistent with all, or virtually all, of the *results* reached by the Court. Indeed, we believe that, though the Court has not consciously articulated our approach, its decisions have reflected the force of that approach. We do not contend, of course, that adoption of our approach will answer all questions under the Confrontation Clause[41] or that it will eliminate all difficult cases.[42] But some cases that have appeared troublesome to the Court become very straightforward under our approach.

First consider *Pointer v. Texas*, 380 U.S. 400, the case that first established that the confrontation right is a fundamental one incorporated by the Fourteenth Amendment, its companion *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Lee v. Illinois*, 476 U.S. 530. These cases all had two features. First, in each of these cases, the declaration at issue was a statement knowingly made in a judicial proceeding or to investigative authorities, providing information material to a criminal investigation. Thus, under any variation of the approach we have presented, the declarants must be deemed to have been witnesses within the meaning of the Confronta-

[41] Our focus here is on when confrontation is necessary, not on what is required for confrontation. Thus, we do not discuss the questions of whether faulty memory of the witness may render confrontation insufficient, *see United States v. Owens*, 484 U.S. 554 (1988), or whether, to be constitutionally valid, the confrontation must always place the accused and the witness in the same room. *See Maryland v. Craig*, 497 U.S 836 (1990); *Coy v. Iowa*, 487 U.S. 1012.

[42] For instance, statements by children pose special issues. *See* n.44, *infra*.

tion Clause. Indeed, in both *Douglas* and *Lee*, as in this case, the declaration was the confession of an alleged accomplice. Second, in these cases the accused did not have an adequate opportunity to confront the witness. Thus, in each of these three cases the conclusion is easy that the accused's confrontation rights were violated -- without any need for anything like the dubious reliability analysis of *Lee*.

By contrast, in *Dutton v. Evans*, 400 U.S. 74 (1970), and *United States v. Inadi*, 475 U.S. 387, the first of these features was not present, and so the statements appear not to have been within the realm of the Confrontation Clause as we have defined it. In *Dutton*, the statement was made by one prisoner to another. In *Inadi*, the statements were made by one member of a conspiracy to another, without any inducement by agents of the prosecution; they were not testifying but carrying on the ordinary business of the conspiracy. Thus, in neither of these cases were the declarants acting as witnesses when they made the statements in issue.[43] A similar argument has force with respect to at least some of the statements made by the four-year-old declarant -- such as those to her babysitter and to her mother -- in *White v. Illinois*, 502 U.S. 346.[44]

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[43] Even when the Confrontation Clause does not apply, a hearsay statement might be considered so egregiously prejudicial, and lacking in probative value, that admissibility would violate due process. Such cases would be quite rare, however.

[44] Statements made by children often pose difficult issues -- none of which need be resolved for purposes of this case. Professor Berger would treat within the ambit of the Confrontation Clause the statements at issue in *Idaho v. Wright*, 497 U.S. 805, because they were deliberately elicited by a physician who had been selected by the police and briefed on the facts of the case. By contrast, the statements to the police in *White* were made much more spontaneously. Professor Friedman (continued...)

In other cases, the second aspect of the *Pointer-Douglas-Lee* line has not been present, because the accused was held to have had an adequate opportunity to confront the witness before trial. That was so in *Mattox v. United States*, 156 U.S. 237, one of the oldest Confrontation Clause cases, in which the witness had testified, subject to cross-examination, at the accused's first trial but died before his second trial. And in *California v. Green*, 399 U.S. 149 (1970), the accused had an opportunity at a preliminary hearing to examine the witness, who appeared at trial but was then uncooperative.[45]

In *Mattox*, the prosecution could not have produced the witness at the trial in question, and in *Green* the prosecution did produce him. In other cases, though the accused had some previous opportunity to examine the witness, he still raised a Confrontation Clause argument that the prosecution had not done what it could to secure the live testimony of the witness at the trial in question. In *Barber v. Page*, 390 U.S. 719 (1968), the Court agreed that the prosecution had failed to make a good faith attempt to secure the attendance of the witness at trial; in addition, it held that in the circumstances the defendant's prior opportunity to examine the witness had not been sufficient. Plainly, the holding of *Barber*

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[44] (...continued)
would consider other factors with respect to children. For example, a very young child might have so little understanding that she should not be deemed a witness for Confrontation Clause purposes -- just as a barking bloodhound should not be deemed a witness. Children may also be more susceptible to the kind of intimidation that might lead a court to conclude that the accused had forfeited his confrontation rights. *See State v. Sheppard*, 197 N.J.Super. 411, 435-42, 484 A.2d 1330, 1345-48 (Burlington Co. 1984).

[45] We do not mean to express an opinion as to whether this opportunity should have been deemed sufficient.

is not inconsistent with our approach. Even assuming the defendant has had a previous opportunity to confront the witness, it is still preferable that the witness testify live, and the prosecution ought to make reasonable efforts to secure his attendance. In *Mancusi v. Stubbs*, 408 U.S. 204 (1972), and *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court held that the prosecution's efforts were satisfactory. Again, nothing in these cases is inconsistent with our approach: Given that the accused had previously had an adequate opportunity to examine the witness,[46] if the witness was unavailable at trial despite good faith efforts, the Confrontation Clause should not preclude use of the earlier testimony.[47]

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[46] In *Mancusi*, the witness had testified at a prior trial of the same case; in *Roberts*, she had testified at a preliminary hearing, which *Green* held to offer an adequate opportunity for confrontation.

[47] Furthermore, if the witness is unavailable at trial but the accused has caused that unavailability, then, as has long been held, the accused forfeited a right to confrontation. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 158-60 (1879); *see generally* Richard D. Friedman, "Confrontation and the Definition of Chutzpa," 31 Israel L.Rev. 506 (1997). If the accused has not engaged in such misconduct, we believe that the prosecution rather than the accused should bear the risk that the declarant will later become unavailable. The prosecution could presumably have protected itself and preserved the defendant's confrontation right by taking the declarant's deposition, except perhaps in those cases where death unexpectedly occurs.

But this case does not raise the question of whether such a strong doctrine of unavailability is necessary, and therefore this issue is not discussed further. This case is not comparable to one in which the witness died suddenly and naturally, so that the prosecution might argue plausibly that it could not reasonably have anticipated having to preserve the accused's ability to confront the declarant. When, as in this case, the asserted cause of unavailability is a claim of privilege, all the cards are in the state's hands. It could try the witness first; it could strike a plea bargain; it could grant use immunity. If the state refuses to play any of those cards, it -- not the accused -- should pay the price of that refusal.

Finally, we note *Williamson v. United States*, 512 U.S. 594. A straightforward result would have recognized that admission of the statement at issue, an accomplice's confession to the police, presumptively violated the Confrontation Clause. Instead, the Court issued a highly restrictive construction of the hearsay exception for declarations against penal interest, expressed in Fed.R.Evid 804(b)(3). The basis for this decision is unfortunate. If extended to declarations against interest in general -- and neither the Court's decision nor the Rule give any basis for declining to do so -- it limits the usefulness of a much-used exception across a broad range of cases, civil as well as criminal; the interpretation in *Williamson* was far more restrictive than most prior authorities suggested, *see* 2 MCCORMICK ON EVIDENCE 344-45 (4th ed. 1992). *Williamson* is thus a good indication that the melding of the Confrontation Clause and of hearsay doctrine tends not only to denigrate the constitutional protection, but also to make hearsay law unduly rigid.

The Court will, we believe, continue to make decisions that reflect the demands of the confrontation right, because that right is such a fundamental, and intuitively appealing, aspect of civilized jurisprudence. But if it continues to use hearsay law as the vehicle for those decisions, it will be unable to articulate either a robust understanding of the constitutional right or a sensible, truth-oriented, doctrine of hearsay.

CONCLUSION

The Court could reach the proper result in this case without revisiting its approach to the Confrontation Clause. But to do so would just be to put one more patch on a tattered garment. It would leave lower courts perplexed on how to apply the Clause, because there would still be no constant guide to the Court's decisions. It would continue

to make effective appellate review impractical, because decisions would still depend so heavily on analysis of the evidence in the particular case. It would require continuing reliance on hearsay doctrine to do the work that should be performed by the Confrontation Clause -- to the detriment of both. It would mean that the Court's stated grounds of decision lack persuasive power. And it would miss out on the great principle underlying the Clause, one integral to the Sixth Amendment and with roots booth deep and broad: When the government prosecutes an accused, the accused has a categorical right to confront "the witnesses against him."

The decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the declaration against penal interest a firmly-rooted exception to the hearsay rule under *Ohio* v. *Roberts*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,

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vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The present case presents this Court with the chance to recognize the changes in the law that have taken place since *Bruton* v. *United States*, 391 U. S. 123 (1968). Declarations against penal interest are now a firmly rooted exception to the hearsay rule. Therefore, codefendant confessions can now be admitted to inculpate defendants, reducing the need for *Bruton*.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

Allowing wider use of voluntary, probative, reliable confessions furthers the interests of truth and justice. Such a result is consistent with the interests of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Gary Barker, the state's principal witness against defendant, shared a room with Mark Lilly, the brother of defendant Benjamin Lilly. *Lilly* v. *Commonwealth*, 499 S. E. 2d 522, 528 (Va. 1998). Barker testified that the day before the murder, he, defendant, and Mark Lilly were at defendant's home smoking marijuana and " 'drinking.' " They decided to go to a friend's house to " 'drink a little bit with him.' " After they discovered that the friend was not home they broke into the house, stealing liquor, a safe, and several guns. They subsequently broke open the safe, dividing the contents. *Ibid.*

The three continued their crime spree the next day. At a convenience store parking lot in Heathwood, Virginia, they abducted Alexander DeFilippis and stole his car. They drove to a remote area by the bank of the New River, near Whitethorne where defendant shot DeFilippis four times with the stolen pistol, killing him. *Ibid.*

The three continued their crime spree of robbing small stores until DeFilippis' car broke down. As the three removed stolen merchandise from the car, the police arrived. The three fled on foot with Barker and defendant being captured almost immediately. *Id.*, at 529. While in the police car, defendant asked Police Chief Whitsett to put his shotgun in defendant's mouth and pull the trigger. Whitsett declined, asking defendant, " 'if I looked like a murderer?' " *Ibid.* Replying to a comment made by defendant, Whitsett asked next " 'what does a murderer look like anyway?' " Defendant replied, " 'me.' " *Ibid.*

Barker and Mark Lilly both gave statements to the police. *Ibid.* Before giving his statement, Mark Lilly was informed that Barker and defendant had stated that he had not committed the killing. Petitioner's Brief 6. Mark Lilly's initial statement "did not mention the murder and maintained that the other two men

had forced him to commit the robberies." *Lilly*, 499 S. E. 2d, at 529. Mark Lilly stated that he only wanted to steal liquor from defendant's friend, not the guns. *Id.*, at 533. He also directly implicated defendant as the instigator of the carjacking and the triggerman in the killing, claiming that he and Barker " 'didn't have nothing to do with the shooting [of DeFilippis].' " *Ibid.*

At defendant's trial, Mark Lilly invoked his self-incrimination privilege, and his statement was admitted as a declaration against penal interest. *Ibid.* Defendant was indicted for and convicted of abducting and robbing DeFilippis, carjacking, murder in the course of a robbery, using a firearm in the principal offense, and being a felon in the possession of a firearm. *Id.*, at 527-528. He was sentenced to death for the capital murder and 27 years for the lesser charged offenses. *Id.*, at 528. The Virginia Supreme Court affirmed his conviction and sentence. *Id.*, at 538. The court rejected defendant's Confrontation Clause objection to Mark Lilly's statement, holding the that statement of an unavailable witness made against penal interest is a "firmly rooted" exception to the hearsay rule. *Id.*, at 534.

After defendant's trial, Mark Lilly pled guilty to first-degree murder, and received a 49-year sentence. Petitioner's Brief 7.

SUMMARY OF ARGUMENT

None of this Court's decisions have categorically disqualified the penal interest exception under the Confrontation Clause. The analysis of *Bruton* v. *United States* is colored by the fact that when it was decided, declarations against penal interest were generally inadmissible. This same feature is present in the Court's most recent confrontation case, *Gray* v. *Maryland*. *Cruz* v. *New York* was simply an application of *Bruton*'s logic and underlying assumptions to the problem of interlocking confessions.

Lee v. *Illinois* must be read in light of the statement it rejected. Because the statement was apparently self-serving and motivated by revenge it was not against declarant's interest. *Lee* only recognizes that such statements cannot qualify under the Confrontation Clause.

Williamson v. *United States* demonstrates that the status of declarations against penal interest under the Confrontation Clause is still undetermined. The fact that all members of this Court were willing to consider that such evidence is admissible under some circumstances demonstrates how much the law has changed since *Bruton*.

Under *Ohio* v. *Roberts*, firmly rooted exceptions to the hearsay rule satisfy the Confrontation Clause. Declarations against penal interest fall within one such exception. Their initial exclusion from the declarations against interest exception was based on a misreading of the law by the House of Lords. This archaic view violates common sense. Justice Holmes, Dean Wigmore, and others demonstrated that people generally do not incriminate themselves lightly, and are thus unlikely to lie when they do so. The Holmes-Wigmore view has carried the day, as the declaration against penal interest exception is observed by most jurisdictions. This extends to the inculpatory use of the penal interest exception, which is now recognized by many jurisdictions.

The standard argument against the admissibility of this evidence, that the declarant has a motive to incriminate others, can and has been addressed by the courts. The most likely motives to cause one to falsely inculpate another are currying favor, revenge, and exculpation. The first motive can be found by courts, and is minimized by the giving of *Miranda* v. *Arizona* warnings. Where the declaration is not made in custody, or where there has been no promise of leniency and the declarant was read his *Miranda* rights, there is no reason to suspect that the statement is an attempt to curry favor.

The fact that a particular type of hearsay evidence can qualify as a firmly rooted exception does not end the inquiry, as courts must still decide whether the particular piece of hearsay is fairly included within the exception. This Court's interpretation of the federal hearsay exceptions should not govern the *Roberts* rule. Tying *Roberts* to this Court's federal evidence decisions will effectively stifle innovation in this field, contrary to *Roberts* and other Confrontation Clause decisions.

The decision of the Virginia courts to admit Mark Lilly's statements as a declaration against penal interest was proper. A key to the reasonableness of this decision is the fact that Mark

Lilly was informed that his two cohorts cleared him of personally committing the killing. This distinguishes the present case from the unreasonable application of the penal interest exception found in *Lee*. Mark Lilly's understanding that he was in the clear for the murder, other than felony-murder liability as an accomplice to the robbery, provides the context that demonstrates that his statement was strongly self-incriminatory, and thus reasonably within the penal interest exception under *Roberts*.

ARGUMENT

I. Whether a declaration against penal interest satisfies the Confrontation Clause is an open issue.

Although the use of one's confession to inculpate an accomplice has led to the reversal of convictions by this Court, the practice has not been categorically banned under the Confrontation Clause. Instead, the decisions rejecting such evidence have either assumed such evidence to be inadmissible, as in the most recent Confrontation Clause decision, see *post*, at 7-8, or have dealt with a statement that was not truly against the declarant's penal interest. The validity of declarations against penal interest under the Confrontation Clause is demonstrated by both the federal penal interest rule, Federal Rule Evid. 804(b)(3), and its interpretation in *Williamson* v. *United States*, 512 U. S. 594 (1994).

This case differs from this Court's previous cases analyzing the constitutionality of the inculpatory use of confessions by an unavailable accomplice. These cases, beginning with *Bruton* v. *United States*, 391 U. S. 123 (1968), dealt with a codefendant's confession that also incriminated the other defendant. Although the present case is factually distinguishable as the confessing third party pled guilty in a subsequent proceeding, see *supra*, at 3, the earlier cases contain language that is capable of being misconstrued to prevent the admissibility of declarations against penal interest. These decisions must be addressed in order to prevent them from distorting the law of evidence through a misinterpretation of the Confrontation Clause.

The most famous decision to reject accomplice confessions, *Bruton* v. *United States* (1968) 391 U. S. 123, dealt with a hearsay statement against penal interest that was inadmissible as a matter of federal law at that time.

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence .... There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we *intimate no view whatever* that such exceptions necessarily raise questions under the Confrontation Clause." *Id.*, at 128, n. 3 (emphasis added).

The *Bruton* Court attacked the confession's inculpatory effect on the nonconfessing defendant. "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect ...." See *id.*, at 136. This statement must be read in the context of its inadmissibility with respect to defendant.[2] The inherent suspicion accorded accomplice testimony is substantially a product of history; in many circumstances accomplice testimony is now given more credence than when *Bruton* was decided. See Part II B, *post*. This development in the law of evidence irrevocably alters the interpretation of the Confrontation Clause.

Bruton's considerable hostility towards hearsay now looks outdated. Modern research casts doubt on *Bruton*'s characterization of third party confessions as "devastating to the defendant." Mock jury studies have found that jurors do not overvalue hearsay testimony. See Miene, Park & Borgida, Juror Decision Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683,

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2. *Douglas* v. *Alabama*, 380 U. S. 415 (1965) is distinguishable for similar reasons. Douglas' accomplice Loyd, who had signed a written confession, had been tried separately and convicted. *Id.*, at 416. He was called to testify at Douglas' trial while his appeal was still pending, and invoked his self-incrimination privilege each time he was asked about the crime. *Ibid.* Loyd was then declared a hostile witness and his confession, which implicated Douglas, was read to him in the form of a series of questions. This evidence was inadmissible against Douglas under Alabama law, but the state appellate court held that Douglas waived his rights because he had "stopped objecting." *Id.*, at 418. Since Loyd could not be cross-examined on this inadmissible evidence, the Court held that Douglas' confrontation rights were violated. See *id.*, at 419-420.

699 (1992). Adding hearsay evidence to circumstantial evidence increased the conviction rate by only four percent, while adding hearsay to eyewitness testimony actually lowered the conviction rate by seven percent. *Ibid.* In another study comparing evaluations of eyewitness and hearsay testimony

> "the results suggest that in general, jurors are skeptical of the quality and usefulness of hearsay testimony. More specifically jurors in this study were able to differentiate between accurate and inaccurate hearsay witnesses." Kovera, Park, & Penrod, Jurors' Perceptions of Eyewitness and Hearsay Evidence, 76 Minn. L. Rev. 703, 722 (1992).

The greater risk of misleading jurors came from eyewitness testimony, not hearsay. *Ibid.* Although criminology cannot explain away the Confrontation Clause, since the clause is premised on preserving the accuracy of factfinding, see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), interpretations of the clause should take this modern research into account. Accomplice confessions are now less likely to be "devastating" when presented to modern juries.

Gray v. *Maryland*, 523 U. S. __, 140 L. Ed. 2d 294, 118 S. Ct. 1151 (1998), the most recent application of *Bruton*, also presupposes that the codefendant's confession was inadmissible against the defendant. Like *Bruton*, *Gray* also involved an out-of-court confession that incriminated both the declarant and the defendant. See *id.*, at 298, 118 S. Ct., at 1153. Defendant and the declarant were tried jointly as codefendants, and the confession was admitted against the declarant Bell, with all references to defendant's or another accomplice's name replaced with the words "deleted" or "deletion." See *ibid.* Maryland's high court held that this did not violate Gray's confrontation rights and reinstated his murder conviction after an intermediate appellate court had set it aside. *Id.*, at 299, 118 S. Ct., at 1153; see *State* v. *Gray*, 687 A. 2d 660, 669 (Md. 1997).

This Court reversed, holding that this method of redacting defendant's name did not satisfy the *Bruton* standard. See *Gray*, *supra*, 140 L. Ed. 2d, at 304, 118 S. Ct., at 1157. The *Gray* decision did not decide whether hearsay admitted as a declaration against penal interest could satisfy the Confrontation Clause. The decision that the confession was rendered inadmissible against

defendant began at the trial court, which granted Gray's motion to remove his name from the confession. See *State* v. *Gray*, *supra*, 687 A. 2d, at 662. Since Bell's confession was never meant to incriminate Gray, *Gray* was no more than an application of *Bruton*'s damage control mechanism—it did not decide whether such confessions always unconstitutionally damaged defendant's interest in effective confrontation.

Gray's analysis of the hearsay confession is best understood in this context. When the decision states that the " 'out of court accusation' [citation] creates a special, and vital, need for cross-examination," *Gray*, *supra*, 140 L. Ed. 2d, at 302, 118 S. Ct., at 1156 (quoting *Bruton*, *supra*, 391 U. S., at 138 (Stewart, J., concurring)), the prejudicial effect of the confession is a given, as in *Bruton*. Whether the need for cross-examination vanishes for a confession admitted as a declaration against penal interest was not decided in *Gray*.

Other decisions applying the penal interest exception note *Bruton*'s limits. "The Court's ruling [in *Bruton*], however, was predicated upon the *inadmissibility* of the statement against the defendant under the rules of evidence . . . ." *United States* v. *York*, 933 F. 2d 1343, 1362 (CA7 1991) (emphasis in original); *United States* v. *Kelley*, 526 F. 2d 615, 620 (CA7 1975); see also Haddad & Agin, A Potential Revolution in *Bruton* Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use, 81 J. Crim. L. & Criminology 235, 239 (1990) ("A common misconception is that *Bruton* interpreted the Confrontation Clause so as to prohibit the use of a codefendant's confession or admission as evidence against a defendant"). *Bruton* did not expand the Confrontation Clause and should not be expanded to limit the evidence in the present case.

Cruz v. *New York*, 481 U. S. 186 (1987) applies *Bruton* to a narrow issue left unresolved in *Parker* v. *Randolph*, 442 U. S. 62 (1979), "whether *Bruton* applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him." 481 U. S., at 188. In *Parker*, the plurality held that when the defendant's and codefendant's confessions confirmed each other, or "interlocked," the codefendant's confession, "will

seldom, if ever, be of the 'devastating' character referred to in *Bruton* . . . ." 442 U. S., at 73. Justice Blackmun, concurring, disagreed with the plurality's reasoning, but found that an interlocking confession could render the Confrontation Clause error harmless. See *id.*, at 80-81. Therefore, *Bruton* was unnecessary as the right of cross-examination "has far less practical value to a defendant who has confessed to a crime than to one who has consistently maintained his innocence." *Ibid.*

Cruz rejected this reasoning in a continuation of the assumptions and logic underlying *Bruton*:

> "While 'devastating' practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U. S., at p. 136, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession." *Cruz*, *supra*, 481 U. S., at 191-192.

As *Cruz* was an application of *Bruton*'s analysis, it had to take as a given *Bruton*'s assumption that a defendant's statements against penal interest were generally inadmissible to inculpate a codefendant. See *id.*, at 189 (jury instructed not to consider the statement against Eulogio Cruz, but only against codefendant/declarant Benjamin Cruz); *id.*, at 193 (holding based on premise that confession "is not directly admissible against the defendant"). The *Cruz* Court did, however, recognize that if this proposition did not hold in certain cases, then *Bruton* would be inapplicable. The *Cruz* Court noted that while the interlocking property of confessions was irrelevant to "*harmfulness*" it was relevant to "*reliability*." See *id.*, at 192-193 (emphasis in original). While an interlocking confession cannot make admissible a confession that is not directly admissible, it can at least be part of the "indicia of reliability," to determine whether the codefendant's confession is

"directly admissible against [the defendant], . . . despite the lack of opportunity for cross-examination . . . ." *Id.*, at 193-194.

Cruz, like the other *Bruton* cases, is not about the admissibility of confessions, but on the capacity of curative instructions to overcome the prejudicial effect of a confession whose inadmissibility against defendant is a given. When a confession is "not directly admissible against defendant" the only issue is whether the Confrontation Clause is violated "even if the jury is instructed not to consider it against the defendant . . . ." *Id.*, at 193.

Lee v. *Illinois*, 476 U. S. 530 (1986) leaves unanswered the question left open in *Bruton*. *Lee* involved a confession implicating an accomplice that was made under particularly suspicious circumstances. Lee was at the police station in order to identify a badly burned body found in the housing complex in which she lived. *Id.*, at 532. A detective became suspicious when she started to cry as she examined photographs of the body. He read Lee her *Miranda* warnings, and asked her about her missing aunt. Lee eventually admitted that she and her boyfriend, Edwin Thomas, were involved in the stabbing of Lee's Aunt Beedie and her friend Odessa Harris, and that the body was her aunt's. *Ibid.* Lee was arrested and signed a written confession. *Ibid.* In her confession, Lee claimed that Thomas alone killed Odessa by stabbing her in the back, while she killed Aunt Beedie under circumstances strongly suggesting self-defense or a homicide less culpable than murder. See *id.*, at 533-534.

Thomas arrived at the police station as Lee was being interrogated. *Id.*, at 532. Lee had inculpated him enough by that point, however, that the officers advised Thomas of his *Miranda* rights, and then accused him of participating in the murders. *Ibid.* Thomas then stated that " 'he wanted to think about' talking to the police." *Ibid.*

After Lee finished confessing, the police allowed the lovers to meet. As the two kissed and hugged, an officer "asked Lee, in the presence of Thomas, 'what was the statement you had just given us implicating Edwin?' " *Id.*, at 532-533. After Lee told Thomas that he had said to her that " 'we wouldn't let one or the other take the rap alone,' " Thomas decided to talk. *Ibid.* His statement spread the blame, painting Lee as an active planner and participant in the murders. See *id.*, at 535. The two were tried jointly without

a jury, and both confessions were used against the defendants. See *id.*, at 536-537. The trial judge relied on Thomas' confession for finding Lee guilty of both murders. *Id.*, at 538.

The *Lee* Court rejected the contention that Thomas' confession came under an established hearsay exception.

> "We reject respondent's categorization of the hearsay involved *in this case* as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as a confession by an accomplice which incriminates a criminal defendant." *Id.*, at 544, n. 5 (emphasis added).

Footnote five must be read in the context of the evidence it rejected. The *Lee* Court had strong reason to doubt the veracity of Thomas' statements, which effectively shifted the blame to Lee. It noted from the facts that Thomas may well have had a desire to fabricate his story out of retaliation against Lee or in order to spread the blame. *Id.*, at 544. This "theoretical motive" was backed up by the fact that "Thomas contemplated becoming a witness for the State against Lee." *Ibid.*

In light of Thomas' strong motive to implicate Lee, his statement is thus best viewed as not being a true declaration against Thomas' penal interest. See *id.*, at 544-545. Simply because some of Thomas' statements may have tended to incriminate him did not render it against his penal interest for the purpose of the hearsay exception. To label Thomas' dubious, blame-spreading statement as against his penal interest "defines too large a class for meaningful Confrontation Clause analysis." *Id.*, at 544, n. 5. *Lee* only disapproved of an improper use of the penal interest question. The fate of a proper use of this rule is still undetermined.

This conclusion is reinforced by *Williamson* v. *United States* (1994) 512 U. S. 594. In *Williamson*, Reginald Harris was arrested after a stop and search of his car yielded 19 kilograms of cocaine in two suitcases in the trunk. *Id.*, at 596. Soon after the arrest, Harris was interviewed over the telephone by Special Agent Walton of the Drug Enforcement Agency. *Ibid.* Harris told Agent Walton that he received the cocaine from an unidentified Cuban in Fort Lauderdale, but that it actually belonged to Williamson and

was to be delivered to a particular dumpster that night. *Ibid.* Harris subsequently fleshed out this story in a personal interview with Agent Walton. See *ibid.*

As Agent Walton started to arrange a controlled delivery of the cocaine, Harris changed his story. Harris said that he had lied about the Cuban and other details. *Id.*, at 597. Harris said that the truth was that he was transporting the cocaine to Atlanta for Williamson, who had been traveling in front of Harris in a rental car. Williamson, therefore, had seen Harris' car being searched by police, making a controlled buy impossible. See *ibid.*

Harris said that he lied because he feared Williamson. He did not want his story recorded, and refused to sign a written version of his confession. Walton testified that he made no promise of help to Harris other than reporting any cooperation to the Assistant United States Attorney. See *ibid.*

Harris refused to testify at trial, even after being given immunity and compelled by a contempt order. Therefore, the trial court allowed Agent Walton to relate Harris' story as a statement against penal interest, Federal Rule of Evidence 804(b)(3). See *Williamson*, *supra*, 512 U. S., at 597. The Court of Appeals affirmed Harris' conviction against a Confrontation Clause attack. *Id.*, at 598.

In a partially divided opinion, the *Williamson* Court established the scope of Rule 804(b)(3). A majority of the Court held that in order to qualify as a statement against penal interest under the federal Rules, the statement must be truly inculpatory; collateral statements would not qualify for the hearsay exception, even if linked to other self-inculpatory statements. See *id.*, at 600-601. The majority split over how to apply this holding to the case before the Court. Four of the six justice majority saw Harris' statement as inadmissible on its face as "Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy," *id.*, at 608 (Ginsburg, J., concurring in part and concurring in the judgment), but would remand the case for harmless error analysis. *Id.*, at 610. The remaining members of the majority held that the case should be vacated and remanded for further findings on whether Harris' statements were "truly self-inculpatory." See *id.*, at 604 (opinion of O'Connor, J.). The three remaining justices took a broader

approach to Rule 804(b)(3) and would allow in some noninculpatory collateral statements. See *id.*, at 620 (Kennedy, J., concurring in the judgment). This concurrence would remand the case for analysis under its standard. *Id.*, at 621.

Although this case did not reach the Confrontation Clause issue, see *id.*, at 605 (opinion of O'Connor, J.), the part of the lead opinion not joined by a majority of the Court hints that statements against penal interest may sometimes inculpate third party defendants without violating the Confrontation Clause.

> "We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Ibid.* (citing *Lee*, *supra*, 476 U. S., at 543-545).

This statement left undecided the question of whether the declaration against penal interest exception "is 'firmly rooted' for Confrontation Clause purposes." *Ibid.*

Neither of the other opinions generally banished statements against penal interest under Confrontation Clause grounds. Justice Ginsburg's concurrence did cite Confrontation Clause precedents in support of the assertion that statements implicating others have trustworthiness and Confrontation Clause problems. See *id.*, at 608. These concurring justices formed the part of a majority opinion that at least contemplated admitting such statements against codefendants. See *id.*, at 603 (majority). While Justice Kennedy's concurrence does not address the Confrontation Clause, the fact that it takes a broader view than the majority of what is admissible under the penal interest exception, see *id.*, at 616 ("the conclusion reached by the Court today—would 'eviscerate the against penal interest exception' "), strongly implies a willingness to admit at least some statements against penal interest over Confrontation Clause objections.

Williamson did not fix the relationship between statements against penal interest and the Confrontation Clause. This Court was confronted with a statement that in some ways looked even less credible than the one summarily rejected in *Lee*. The confession in *Lee* implicated both defendants equally, see *supra*,

at 10; the confession in *Williamson* portrayed Harris as a little fish acting under the direction of the much larger catch, Williamson. See *supra*, at 12. Harris' confession contradicted an earlier one he made on several key points, and he refused to make a written statement of it. See *supra*, at 12. In spite of this, a majority of this Court was willing to consider the possibility that Harris' unredacted statement was still admissible. See *Williamson*, *supra*, 512 U. S., at 604 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

This is a very far distance traveled from a *Bruton* opinion which abruptly dismissed similar evidence in a footnote. See *supra*, at 6. *Williamson* and Rule 804(b)(3) reflect more than a change in federal evidence law. They represent the penal interest exception's coming of age.

II. An appropriately interpreted penal interest exception is sufficiently firmly rooted to satisfy the Confrontation Clause.

A. The Roberts Rule.

The seemingly straightforward language of the Confrontation Clause, U. S. Const., Amdt. 6 ("the accused shall enjoy the right . . . to be confronted with the witnesses against him"), creates a problem. Courts seem to have but one of two choices for the Confrontation Clause. At one extreme, the clause would prevent any hearsay testimony from being admitted against criminal defendants. The other approach distinguishes between witnesses and declarants, applying the Confrontation Clause only to actual witnesses against the defendant. See *Dutton* v. *Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring) (quoting 5 J. Wigmore, Evidence § 1397, p. 131 (3d ed. 1940)). Cross-examination of testimonial statements which are given " 'infra-judicially,' " such as dying declarations, would be governed by the law of evidence instead of the Constitution. See *ibid.* Resolving this question is made even more difficult by the relatively scant history concerning the framers' intent behind the words of the Confrontation Clause. See *id.*, at 95; *White* v. *Illinois*, 502 U. S. 346, 358-359 (1992) (Thomas, J., concurring).

This Court has resolved the hearsay dilemma by choosing a third way. It was impractical and unfair to ban a whole body of often trustworthy and highly probative evidence from the prosecution's arsenal. Thus, the Supreme Court rejects this approach, which "would abrogate virtually every hearsay exception, . . . as unintended and too extreme." *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980). Nor has it adopted the limited physical-confrontation approach. See *White*, *supra*, 502 U. S., at 352. Instead, the Court has found "success in steering a middle course among proposed alternatives" for the Confrontation Clause, *Roberts*, 448 U. S., at 68, n. 9, by examining the reliability of the hearsay statement. See *id.*, at 65-66. Therefore, hearsay testimony with sufficient "indicia of reliability" may be admitted against defendant under the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972).[3]

This approach carries its own burdens. Because this middle way and the hearsay rule serve such similar interests, see *California* v. *Green*, 399 U. S. 149, 155 (1970), and have such similar roots, see *Dutton*, *supra*, 400 U. S., at 86, there is a danger that application of the Confrontation Clause decisions may in this manner subvert the development of the hearsay rule. See *id.*, at 86-87, n. 17 (plurality). Although close, the Confrontation Clause and the hearsay rule should not be and are not the same. The states are the primary enforcers of criminal law, see *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and their rules governing criminal trials should generally be left untouched by the federal Constitution. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). A case-by-case examination of the individual reliability of each hearsay statement admitted against a defendant would turn the hearsay rule into a quagmire. "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Roberts*, *supra*, 448 U. S., at

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3. This rule typically requires the witness to be unavailable. See *Roberts*, 448 U. S., at 65. Sometimes, however, unavailability does not have to be proven. See *id.*, at 65, n. 7. When the penal interest exception rule is at issue, the declarant will typically be unavailable by claiming the self-incrimination privilege. See *Lee* v. *Illinois*, 476 U. S. 530, 549, n. 3 (1986) (Blackmun, J., dissenting).

64. Turning the Confrontation Clause into a case-by-case statute for the hearsay rule frustrates these compelling interests.

Roberts addressed these concerns. In addition to allowing the state to prove the reliability of hearsay on a case-by-case basis, *Roberts* held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*, at 66.

This holding shines a light through the fog of the Confrontation Clause. Focusing on hearsay exceptions comports with how the hearsay rule is applied; a general rule against hearsay subject to numerous specific exceptions.[4] See, *e.g.*, Fed. Rules Evid. 802-804; 5 J. Wigmore, Evidence § 1366, pp. 28-29 (J. Chadbourn rev. 1974) (dividing hearsay rule into the rules requirements, its exceptions, nontestimonial utterances to which the rule does not apply, and applying the rule to statements of the tribunal).

The *Roberts* rule is respectful of, but not wedded to, history. A long-recognized exception is more likely to contain sufficient "indicia of reliability" to satisfy the Confrontation Clause. See *Mancusi*, *supra*, 408 U. S., at 213 (noting long acceptance of prior recorded testimony). Since the hearsay rule, like the Confrontation Clause, is motivated by accuracy, compare *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985) (purpose of Confrontation Clause to advance the accuracy of trials) with 5 Wigmore, *supra*, § 1362, at 3 (purpose of hearsay rule to test assertions of witnesses through cross-examination), common sense dictates that those exceptions which best promote accuracy will survive the test of time.

The Confrontation Clause does not, however, petrify the hearsay rule. "The confrontation clause is not just a codification of the rules of hearsay and their exceptions as they existed historically at common law." *People* v. *Farmer*, 47 Cal. 3d 888, 905, 765 P. 2d 940, 951 (1989) (plurality). The best description of the adaptability that is the essence of the Supreme Court's Confrontation Clause jurisprudence comes from *Roberts*. "True

4. The "catch-all" hearsay exception, see, *e.g.*, Fed. Rule Evid. 803(24), is not a firmly rooted exception under *Roberts*. See *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990) (rejecting "firmly rooted" status for equivalent state rule).

to the common-law tradition, the process has been gradual, building on past decisions, *drawing on new experience, and responding to changing conditions*." *Roberts*, *supra*, 448 U. S., at 64 (emphasis added). This is a necessity in a body of law as organic as the law of evidence. "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law." *Donnelly* v. *United States*, 228 U. S. 243, 277-278 (1913) (Holmes, J., dissenting). Therefore, "[t]he Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions." ' " *Roberts*, 448 U. S., at 64-65 (quoting *Green*, *supra*, 399 U. S., at 162).

This Court has upheld many of the hearsay exceptions against Confrontation Clause attack. One of its earliest confrontation cases upheld the dying declaration exception. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); cf. Fed. Rule Evid. 804(b)(2). The Court has also upheld cross-examined prior testimony, see *Mancusi*, *supra*, 408 U. S., at 213-216; cf. Fed. Rule Evid. 804(b)(1), and the statement of a coconspirator made in furtherance of the conspiracy. See *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987); see also Fed. Rule Evid. 801(d)(2)(E).

A particularly informative example of what satisfies the *Roberts* rule is found in *White* v. *Illinois*, 502 U. S. 346 (1992). The *White* Court examined the " 'spontaneous declaration' " and " 'medical examination' " exceptions to the hearsay rule under the Confrontation Clause. *Id.*, at 348-349. In finding that the spontaneous declaration exception was firmly-rooted under *Roberts*, the *White* Court noted this exception had a long history and was broadly accepted. See *id.*, at 355, n. 8. The medical examination exception was also firmly rooted as it was "similarly recognized in Federal Rule of Evidence 803(4) and is equally widely accepted among the states." *Id.*, at 356, n. 8. This passage is most important in what it does not contain. Neither history nor a detailed analysis of the medical examination exception's trustworthiness justified its acceptance. The simple fact of its acceptance under both state and federal rules was enough to justify an exception with few common law roots, which was essentially created by the Federal Rules of Evidence. See Friedman, Confrontation: A Search for Basic Principles, 86 Geo. L. J. 1011,

1019-1020 (1998). This stands in sharp contrast to the more aggressive analysis found in *Lee* v. *Illinois*, 476 U. S. 530 (1986). See Friedman, 86 Geo. L. J., at 1019. Now, "a synonym for 'firmly rooted' it seems, is 'in the Federal Rules of Evidence.' " *Id.*, at 1020.

The one commonly recognized exception that does not satisfy *Roberts* is the residual exception for statements not covered by a specific exception that has "equivalent circumstantial guarantees of trustworthiness." Fed. Rules Evid. 803(24). In *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990), this Court came to the necessary conclusion that this broad, unspecific standard could not be "a firmly rooted hearsay exception for Confrontation Clause purposes."[5] Unlike a standard hearsay exception, which

> "satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements," *ibid.*,

the residual exception embodied a very different purpose.

> "The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Ibid.*

Because this exception is so diffuse, if the Court were

> "to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.*, at 817-818.

This Court's interpretation of the Confrontation Clause examines hearsay exceptions through a combination of common sense and a respect for the collective wisdom of legislatures and the courts, consistently with the "common-law tradition . . . ." *Roberts*, *supra*, 448 U. S., at 64. As the next section will demonstrate, declarations against penal interests are now part of that tradition. The rationale behind the exception makes sense, and its common sense is reflected in the many jurisdictions that accept this rule. It is time for this Court to admit declarations against penal interest into the family of firmly rooted hearsay exceptions.

5. *Wright* dealt with Idaho's residual hearsay exception which was taken nearly verbatim from the Federal Rules of Evidence. See 497 U. S., at 811-812; Idaho Rule Evid. 803(24).

B. The Firmly Rooted Exception.

The law of evidence has now evolved to the point that statements against penal interest can be considered a "firmly rooted" exception to the hearsay rule under *Roberts*, 448 U. S., at 66. The sheer common sense of the proposition that people rarely falsely incriminate themselves is a strong argument for its general acceptance, as Justice Holmes so eloquently explained:

> "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. —The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man (*Mattox* v. *United States*, 146 U. S. 140); and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length." *Donnelly* v. *United States*, 228 U. S. 243, 277 (1913) (Holmes, J., dissenting).

The declaration against interest exception, like most other exceptions to the hearsay rule, developed in the early eighteenth century. 5 J. Wigmore, Evidence § 1455, p. 323 (J. Chadbourn rev. 1974). The "arbitrary limit" of this rule to exclude statements against penal interests came about in a poorly reasoned decision of the House of Lords limiting the rule to statements against pecuniary or proprietary interest. See *id.*, at 351; *Sussex Peerage Case*, 11 Cl. & F. 85, 111-114, 8 Eng. Rep. 1034, 1044-1046 (1844). Although this decision was contrary to previous interpretations of the rule, see Wigmore, *supra*, at 350-351, it was accepted in both England and the United States. See *id.*, at 351-352.

This policy was wrong from its inception.

> "Was the practice of excluding third-person confessions in criminal cases justified? It certainly could not be justified on the ground that an acknowledgment of facts rendering one liable to criminal punishment is less trustworthy than acknowledgment of a debt. The motivation for the exclusion was no doubt a different one, namely, the fear of opening the door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false. This fear was based on the likely criminal character of witness and declarant, reinforced by the requirement that declarant must be unavailable, which made perjury easier to accomplish and more difficult to punish." 2 J. Strong, McCormick on Evidence § 318, p. 340 (4th ed. 1992).

The distinction from the other accepted hearsay exceptions was senseless.

> "This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it's notorious that some witnesses lie and that it is difficult to avoid being deceived by their lies." 5 Wigmore, *supra*, § 1477, at 358-359.

Wigmore and Holmes argued to admit statements against penal interest in the context of third-party confessions exonerating

criminal defendants. See *id.*, at 359; *Donnelly*, *supra*, 228 U. S., at 277 (Holmes, J., dissenting). There is no reason inherent to the Confrontation Clause to limit declarations against penal interest to those exonerating the accused. The Confrontation Clause is concerned with accuracy,[6] see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), and accuracy is a two-edged sword. If justice is due equally to the accused and accuser, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934), then so is accuracy.

The standard modern argument for excluding the inculpatory use of statements against penal interest is that, while under arrest, an accomplice has "strong motivation to implicate the defendant and to exonerate himself" and therefore any statements "about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S. 123, 141 (1968) (White, J., dissenting). While many potential declarations against penal interest may be made under this circumstance, even statements made in police custody may be sufficiently credible to satisfy the Confrontation Clause.

Three related motivations—currying favor, revenge, and exculpation—are most likely to cause someone to implicate another falsely while also implicating oneself. Currying favor from the authorities, a motive recognized by the drafters of Federal Rule 804(b)(3), see Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 790, and by the courts, see, *e.g.*, *Williamson* v. *United States*, 512 U. S. 594, 601 (1994), can

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6. *Amicus* ACLU's request to replace the current mode of Confrontation Clause analysis with one based on preventing testimonial statements which have not been cross-examined does not overcome the importance of accurate fact-finding to this Sixth Amendment right. This Court has already turned down a request by the United States to depart from its traditional interpretation of the right to confrontation in favor of an approach limiting the Clause to the prohibition of *ex parte* affidavits at trial against the defendant. See *White* v. *Illinois*, 502 U. S. 346, 352-353 (1992). This Court summarily dismissed any attempt to depart from the principles first described in *Mattox*. "We think that the argument presented by the Government comes too late in the day to warrant the reexamination of this approach." *Id.*, at 353. *Amicus* CJLF submits that the same rationale applies to the ACLU's proposal. If this Court is willing to overhaul its Confrontation Clause precedent, *amicus* CJLF submits that it should not settle for the solution proposed by the ACLU, but should instead carry out the complete reform advocated by the United States in *White*.

be identified and addressed by the courts. The requirement that suspects be informed of their rights before custodial interrogation, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), helps to minimize the threat. The *Miranda* warnings minimize such dangers by informing the suspect "that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.*, at 469.

Where a defendant has been informed of his rights, and no promises of leniency were made, there is no reason to exclude declarations against penal interest. See, *e.g.*, *Williamson*, *supra*, 512 U. S., at 620 (Kennedy, J., concurring in judgment); *United States* v. *Garcia*, 897 F. 2d 1413, 1421 (CA7 1990). Any problem with efforts to curry favor should therefore be easy to control.

Exculpation and revenge were found by this Court in *Lee* v. *Illinois*, 476 U. S. 530 (1986). The relative ease with which the *Lee* Court uncovered them demonstrates that these difficulties are controllable. The bare facts before the Court strongly intimated the unacceptable motives behind Thomas' confession.[7] Revenge was inferred from codefendant Thomas' knowledge that Lee had implicated him and that he had almost testified for the prosecution. See *id.*, at 544. Thomas' self-exculpatory motive was similarly inferable as the nature of his statement showed a desire to shift blame from himself alone to a shared blame with the person who implicated him. See *ibid.* Separating the hearsay chaff from the declaration against penal interest wheat in this manner is something that courts do routinely. See 2 Strong, *supra*, § 319, at 346, n. 21 (discussing cases).

With so strong a measure of common sense behind it, it is understandable that the declaration against penal interest is now a "firmly rooted" exception to the hearsay rule. The arguments of Wigmore and Holmes spread throughout the courts and legislatures, leading to a relaxation of the rule excluding declarations against penal interest. See *id.*, at 340-341. The penal interest exception is now recognized by the federal system, see Fed. Rule Evid. 804(b)(3), California, see Cal. Evid. Code § 1230, and by most of the other states. See 5 Wigmore, *supra*, § 1477, at 360-

7. For a detailed description of the facts in *Lee*, see *supra*, at 10-11.

362, n. 7; *id.*, at 622-626 (Supp. 1998). A small minority of the states adopting the exception have excluded statements offered against the defendant in a criminal case. See *id.*, at 622-626 (Arkansas, Indiana, Nevada, New Jersey, North Dakota, Vermont). These rules may have been adopted in the mistaken belief that such an exception is constitutionally required. The House added similar language to the federal rule at one point. See House Judiciary Committee's Note on Fed. Rule Evid. 804, 28 U. S. C. App., p. 791; cf. *supra*, at 8. The language was deleted in the Senate, which recognized the codification was unwise where the principle was "under development." See Senate Judiciary Committee's Note on Fed. Rule Evid. 804, 28 U. S. C. App., pp. 791-792.

The initial rejection of this exception by the House of Lords, and the initial decision of American courts to follow this accident of history, should not change the analysis. The *Roberts* rule and this Court's other Confrontation Clause cases are marked by a respect, but not reverence, for history. See *supra*, at 16-17. The Confrontation Clause is not meant to stifle needed reforms of the law of evidence with historical baggage.

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* [v. *Texas* (1965) 380 U. S. 400] has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Dutton* v. *Evans*, 400 U. S. 74, 86-87, n. 17 (1970) (plurality) (internal quotation marks omitted).

The journey from the *Sussex Peerage Case*, *supra*, to the modern penal interest exception is a needed reform that allows reliable evidence into the courtroom. The Confrontation Clause should not be invoked to squelch it.

Holmes and Wigmore made their strongest arguments for the penal interest exception as a method for exculpating a criminal defendant through an out-of-court confession by a third party.

See, *e.g.*, *Donnelly*, *supra*, 228 U. S., at 277 (Holmes, J., dissenting); 5 Wigmore, *supra*, § 1477, at 359-360. Like evidence law in general, the penal interest exception has changed over time. Many jurisdictions now willingly accept the inculpatory use of declarations against penal interest by third parties or codefendants as incriminating evidence against defendants. See, *e.g.*, *People* v. *Gordon*, 50 Cal. 3d 1223, 1252-1253, 792 P. 2d 251, 267-268 (1995); *United States* v. *Trenkler*, 61 F. 3d 45, 61-62 (CA1 1995); *United States* v. *Casamento*, 887 F. 2d 1141, 1170-1171 (CA2 1989); *United States* v. *Alvarez*, 584 F. 2d 694, 701 (CA5 1978) (admissible with sufficient corroborating evidence); *Curro* v. *United States*, 4 F. 3d 436, 437 (CA6 1993); *United States* v. *Hamilton*, 19 F. 3d 350, 354-357 (CA7 1994); *Berrisford* v. *Wood*, 826 F. 2d 747, 751 (CA8 1987); *United States* v. *Williams*, 989 F. 2d 1061, 1068 (CA9 1993); *United States* v. *Taggart*, 944 F. 2d 837, 840 (CA11 1991); *State* v. *Wilson*, 918 P. 2d 826, 836-837 (Or. 1996); *People* v. *Dhue*, 506 N. W. 2d 505, 509 (Mich. 1993); *Harrison* v. *Commonwealth*, 858 S. W. 2d 172, 175-176 (Ky. 1993); *State* v. *Kiewert*, 605 A. 2d 1031, 1034-1035 (N.H. 1992); *People* v. *Moore*, 693 P. 2d 388, 390 (Colo. App. 1984); *State* v. *Hoak*, 692 P. 2d 1174, 1179-1180 (Idaho 1984) (admissible with "sufficient 'indicia of reliability' "; test not met in present case); *State* v. *Valladares*, 664 P. 2d 508, 511 (Wash. 1983); *Commonwealth* v. *Goldblum*, 447 A. 2d 234, 241-242 (Pa. 1982); *State* v. *Naas*, 409 So. 2d 535, 543, n. 2 (La. 1981).

Few jurisdictions have directly addressed whether the declaration against penal interest exception is firmly rooted enough to satisfy the Confrontation Clause. Some courts have avoided the issue, instead applying the second prong of *Roberts*' "particularized guarantees of trustworthiness" test. See, *e.g.*, *Wilson*, *supra*, 918 P. 2d, at 836-837; *Dhue*, *supra*, 506 N. W. 2d, at 511. Fortunately, other jurisdictions have been more direct, tackling the problem head on by holding that the penal interest exception is "firmly rooted," thus satisfying the Confrontation Clause. See, *e.g.*, *United States* v. *Katsougrakis*, 715 F. 2d 769, 776 (CA2 1983); *United States* v. *York*, 933 F. 2d 1343, 1363 (CA7 1991); *Berrisford*, *supra*, 826 F. 2d, at 751; see also *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (Breyer, J.) ("the exception for declarations against penal interest would seem to be 'firmly rooted' ").

It is time for this Court to declare the penal interest exception firmly rooted under the *Roberts* rule. The constitutional waters are safe. The widespread acceptance of the penal interest exception, in both the federal rules and various state rules, and the almost equally widespread acceptance of its use as inculpatory evidence provide compelling justification for applying *Roberts*' first prong. Any doubts about the wisdom of declaring this exception firmly rooted vanish in light of the basic soundness of the rule; declarations that are truly against one's penal interest are highly likely to be truthful.

III. The Virginia Supreme Court's decision that Mark Lilly's statements qualify under the penal interest exception is reasonable.

The fact that a particular type of hearsay evidence can qualify as a firmly rooted exception under *Ohio* v. *Roberts*, 448 U. S. 56 (1980) does not end the inquiry. Courts still must decide whether the particular piece of evidence is fairly included within the firmly rooted exception. This inquiry can involve delicate balancing between the integrity of the confrontation right and the independence of local rules of evidence. If the interpretation of the *Roberts* exception is too expansive, then the integrity of the Confrontation Clause is threatened; a firmly rooted exception such as the penal interest rule cannot be a mere label slapped on any type of hearsay to render it immune from Confrontation Clause scrutiny. This concern, while important, should not be allowed to subvert *Roberts*' purpose of fostering in each jurisdiction "the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Id.*, at 64.

Virginia's interpretation of the penal interest exception should be allowed to qualify under the *Roberts* rule even if it may be broader than this Court's interpretation of the federal penal interest exception in *Williamson* v. *United States*, 512 U. S. 594 (1994). *Williamson* was a nonconstitutional decision; it recognized that a broader rule may be possible under the Confrontation Clause. See *id.*, at 600 ("Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements"). If

Williamson and other federal hearsay decisions are allowed to define the *Roberts* rule, then they would effectively become binding on the states as a matter of hearsay law, even if a state does not precisely follow the federal rules for its own law of evidence.[8]

As the final authority on federal questions, this Court may be "infallible" in the construction of the Federal Rules of Evidence. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result). Such infallibility does not, however, extend to state evidence law.

> "However ill-advised would be the constitutionalization of hearsay rules in federal courts, the undesirability of imposing those brittle rules on the States is manifest. Given the ambulatory fortunes of the hearsay doctrine, evidenced by the disagreement among scholars over the value of excluding hearsay and the trend toward liberalization of the exceptions, it would be most unfortunate for this Court to limit the flexibility of the States and choke experimentation in this evolving area of the law." *California* v. *Green*, 399 U. S. 149, 184-185 (1970) (Harlan, J., concurring) (footnote omitted).

Lee v. *Illinois*, 476 U. S. 530 (1986) provides an example of what would be an improper application of the penal interest exception. The codefendant confession in that case was hopelessly compromised as a declaration against penal interest because the police gave the declarant an overwhelming motive to implicate his codefendant. When the police informed Thomas that Lee had implicated him, contrary to their previous agreement, he had a compelling emotional reason to avenge himself and a strong

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8. Under this scenario a state court could still theoretically admit hearsay that does not conform to this Court's interpretation of the federal rules under this Court's "particularized guarantees of trustworthiness" test. See, *e.g.*, *Lee* v. *Illinois*, 476 U. S. 530, 534 (1986). This option is less practical than it appears, due to the difficulty of satisfying this test. Evidence that does not come under a firmly rooted exception is deemed "*presumptively* unreliable, and inadmissable for Confrontation Clause purposes." *Ibid.* (emphasis added). Ease of administration and the risk of losing convictions to appellate reversal or collateral attack will give state trial courts considerable incentive to rigidly follow this Court's interpretation of the hearsay exceptions.

practical reason to spread the blame by incriminating the person who blamed him. See *supra*, at 11.

The present case does not fit the pattern of unreasonableness demonstrated in *Lee*. A key distinction between the two is that Mark Lilly was told by the interrogating officer that Barker and Lilly both stated that he did *not* commit the murder, the exact opposite of the scenario in *Lee*. See Brief for Petitioner 6. Besides Mark Lilly, there were three eyewitnesses to Alexander DeFilippis' murder: Gary Barker, defendant, DeFilippis himself. The best witness, DeFilippis, was, of course, dead. Once Mark Lilly had been informed that the two other potential witnesses against him had cleared him from any complicity for the actual killing, he was in the clear. Thus he had little to gain and potentially much to lose by answering any questions about the killing. This stands in sharp contrast to the vengeful, essentially exculpatory confession in *Lee*.[9]

The fact that Mark Lilly's declaration contains statements that do not inculpate him does not render its admission. Such statements provide a necessary context, aiding the trier of fact's understanding of the declaration.

> "Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy (§ 1457 *supra*), it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement*." 5 J. Wigmore, Evidence § 1465, p. 339 (Chadbourn rev. 1974) (emphasis in original).

Such statements can, "subject to the constraints of the Confrontation Clause," be fairly included in the penal interest rule. See *Williamson*, *supra*, 512 U. S., at 600. Even if this Court does not construe the Federal Rules of Evidence to admit such contextual

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9. Motive also distinguishes this case from *Williamson*, *supra*. The declarant in that case was caught with a large quantity of cocaine with no apparent defense other than implicating a "bigger fish." See *Williamson*, *supra*, 512 U. S., at 604 (O'Connor, J.). His exoneration for the murder by his partners relieved Mark Lilly of the need to implicate others found in *Williamson*

S. Ct.hearsay as a matter of evidentiary law, this practice is not so unreasonable as to violate the Confrontation Clause.

Petitioner's attempt to bolster his case by attacking custodial confessions, see Brief for Petitioner 44-45, and n. 25, should not lead this Court to categorically exile these statements from the penal interest exception. Custodial confessions that survive the rigorous scrutiny of *Miranda* and the due process voluntariness requirement, see, *e.g.*, *Colorado* v. *Connelly*, 479 U. S. 157, 163 (1986), are vital to our criminal justice system.

> "Admissions of guilt resulting from *Miranda* waivers 'are more than merely "desirable" they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' " *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991) (citation omitted) (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)); see also *People* v. *Garner*, 57 Cal. 2d 135, 164, 367 P. 2d 680, 697 (1961) (Traynor, J., concurring) ("So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation").

Although the constitutionality of the declarant's interrogation is not dispositive of the Confrontation Clause issue, see *Lee*, *supra*, 476 U. S., at 544, it does place the custodial statement in a better light than it would have without the benefit of these protections, a fact that deserves consideration in favor of admitting custodial confessions under the penal interest exception.[10] Indeed, the police interrogator in the present case provided a key element in support of the reliability of Mark Lilly's statement—the knowledge that he had not been blamed by either of his companions.

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10. *Lee*'s broad disavowal of any relationship between voluntariness and reliability must be read in light of the extremely strong motives for blame spreading found in that case. See *supra*, at 11. While it is true that the voluntariness requirement serves more purposes than ensuring the reliability of verdicts, see *Connelly*, *supra*, 479 U. S., at 168, it is no less true that "an involuntary confession is inadmissible in part because such a confession is likely to be unreliable . . . ." *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981). While not dispositive, voluntariness will have at least some positive bearing on the statement's reliability.

The Confrontation Clause is interpreted to insure that the government's case against the defendant is based upon the truth. Admitting declarations against penal interest against defendants is consistent with this goal. The risk of any confession is sufficiently strong to make any suspect think twice before confessing, even if the confession also implicates another. The decision of the Virginia Supreme Court to uphold the admission of Mark Lilly's statement under this firmly rooted exception was a reasonable one.

CONCLUSION

The decision of the Virginia Supreme Court should be affirmed.

February, 1999

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In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

BRIEF OF THE STATES OF NEBRASKA, ARIZONA, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE AND TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici states are charged with the responsibility of protecting the citizens of their respective states by the capture, conviction and removal of criminals from the general civilian population. Crucial to that process is the gathering and the admission at trial of relevant evidence of a criminal defendant's guilt of the crime charged.

The amici states come before this court in the belief that individuals unavailable to testify in a criminal trial, nonetheless may well have been possessed of critical, accurate and relevant information which they had previously communicated. In that belief, the amici states have in place state-created rules of evidence which permit the admission into evidence of statements against a declarant's penal interest against third parties. It is the desire of these states to preserve that state-created option as a part of their state law.

SUMMARY OF ARGUMENT

The fundamental concern of the Confrontation Clause is the search for truth. In that search we are to employ only legally appropriate evidence. The laws of the amici states allow the admission of statements made against penal interest into evidence against third parties.

Idaho v. Wright instructs that when such evidence is allowable under state evidentiary standards, the concerns of the Confrontation Clause are satisfied by one of two tests: (1) That the hearsay exception in question is "firmly rooted" in the law, or (2) that the government has met its

burden to demonstrate that the offered statement has particularized guarantees of trustworthiness.

The hearsay exception at issue here was "firmly rooted" in the law of England at the time the Confrontation Clause was created, and is presently "firmly rooted" in the laws of our state and federal courts. In the case here at issue, the Virginia Supreme Court has specifically held that the exception in question is "firmly rooted" in the law of that state.

Beyond that, if particularized guarantees of trustworthiness need be established by the states to satisfy the concerns of the Confrontation Clause, then the state's ability to do so should not be further limited but, instead, expanded to allow the introduction of any relevant evidence which demonstrates the *reliability and accuracy* of the statement being offered. Only by that process may the search for truth truly be advanced.

ARGUMENT

Introduction

A.

Trials should be first and foremost a mechanism for discerning the truth. We do not dispute the historically held belief that confrontation of witnesses is a device sometimes helpful in ferreting out the truth. However, it is not the only truth-seeking device available in American trials.

The rules of evidence employed in the trial of English and America cases for centuries have recognized that not

all probative evidence need come from the mouth of a witness physically present at trial. Like most other rules of law, there exist rational and time-tested exceptions to the general rule against hearsay testimony. E.g., *Federal Rules of Evidence*, Rules 803 and 804. These exceptions are based upon some hard and pragmatic realities. One of which is that it is difficult, if not impossible, to cross examine the dead (or witnesses otherwise equally "unavailable"). Yet that does not mean that the dead, while living, were not in possession of credible evidence relevant to finding the truth of the matter being tried.

The law of this nation and the laws of the states recognize that under certain well defined circumstances, the statements of an unavailable witness may be properly placed before a fact finder without offending the Confrontation Clause of our federal constitution. The opportunity to offer such evidence should not be foreclosed. To do so will not further the search for truth, but thwart it.

In cases such as this, such a rule will unnecessarily benefit the lawless and represent an unnecessary detriment of the public safety.[1]

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[1] Currently the State of Nebraska has pending before the Nebraska Supreme Court a capital case involving a random and racially motivated homicide in which a young black woman was abducted, physically and sexually assaulted and then murdered solely because of her race. *State v. Sheets*, #S-97-1069. In that case, the admissibility of a co-actor's self-incriminating statement may well prove dispositive of the State of Nebraska's ability to convict for that offense. The Nebraska Supreme Court thus awaits the decision in this case.

B.

The limitless spectrum of human behavior, motivation and truthfulness makes irrational the assertion that *all* custodial statements against interest that also incriminate others are uniformly unreliable. That conclusion is no more worthy of belief than the conclusion all such statements are uniformly credible.

If our criminal justice experience teaches nothing else, it teaches that universal judgments as to the motivations, behavior and truthfulness of human beings are extremely problematic. However, in some situations the corporate experience of society, over time, reaches the conclusion that certain statements are *credible enough* to appropriately be placed before a fact finder, even if the declarant is unavailable. Thus, the specific exceptions to the rule against hearsay. In situations not covered by such historical insight, the reliability and the accuracy of a statement should be evaluated in the context of (1) the unique situation of the declarant, (2) the unique environment in which that statement was made, and (3) what independent corroboration of the accuracy of the statement can be offered.

Each of these elements is *intensely factual* in nature. The determination of whether sufficient indicia of reliability surround any particular unavailable witness' out of court statement so as to allow its admission into evidence is unavoidably a fact specific question which must be resolved on a case-by-case basis. The question does not lend itself to, nor does the Confrontation Clause demand, a blanket prohibition of such statements.

I.

THE RELATIONSHIP BETWEEN THE CONFRONTATION CLAUSE AND EXCEPTIONS TO THE RULE AGAINST HEARSAY

The law of Virginia recognizes an exception to the rule against hearsay for statements made against the interest of the declarant. *Lilly v. Commonwealth*, 255 Va. 558, 499 S.E.2d 522, 533 (1998). The amici states and numerous other jurisdictions employ a similar exception.[2]

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[2] Alaska Rules of Evidence, Rule 804(b)(3); Arkansas Rules of Evidence 804(b)(3); California Evidence Code § 1230; Colorado Rules of Evidence 804(b)(3); Delaware Uniform Rules of Evidence, Rule 804(b)(3); Hawaii Rules of Evidence, Rule 804(b)(3); Idaho Rules of Evidence, Rule 804(b)(3); Indiana Rules of Evidence, Rule 804(b)(3); Iowa Rules of Evidence, Rule 804(b)(3); Kansas Statutes Annotated § 60-460(j); Kentucky Rules of Evidence, Rule 804(b)(3); Louisiana Code of Evidence Art. 804(B)(3); Maryland Rules of Procedure, Evidence, Rule 5-804(b)(3); Michigan Rules of Evidence, Rule 804(b)(3); Minnesota Rules of Evidence, Rule 804(b)(3); Mississippi Rules of Evidence, Rule 804(b)(3); Montana Rules of Evidence, Rule 804(b)(3); Nebraska Rules of Evidence § 27-804(2)(c); New Hampshire Rules of Evidence, Rule 804(b)(3); New Mexico Rules of Evidence, Rule 804(b)(3); North Carolina Rules of Evidence, Rule 804(b)(3); Ohio Rules of Evidence, Rule 804(b)(3); Oklahoma Evidence Code § 2804(B)(3); Oregon Rules of Evidence, Rule § 40.465(3)(c); Puerto Rico Rules of Evidence 64(B)(3); Rhode Island Rules of Evidence, Rule 804(b)(3); South Dakota Codified Laws § 19.16-32; Tennessee Rules of Evidence, Rule 804(b)(3); Texas Rules of Criminal Evidence, Rule 803(24); Utah Rules of Evidence, Rule 804(b)(3); Virgin Islands Code Ann. tit. 5 § 932(10); Washington Rules of Evidence, Rule 804(b)(3); West Virginia Rules of Evidence, Rule 804(b)(3); Wisconsin Stat. Ann. § 908.045(4); Wyoming Rules of Evidence, Rule 804(b)(3); Military Rules of Evidence, Rule 804(b)(3), 45 Fed. Reg. 16,932. See, Evidence in America, The Federal Rules in

The relationship between the Confrontation Clause and state and federal evidentiary rules recognizing exceptions to the rule against hearsay have been a recurring issue before this Court. See cases collected in *White v. Illinois*, 502 U.S. 346, 352-53 (1992).

In *White* this Court reiterated this Court's refusal to "equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *White*, at 352, quoting *Idaho v. Wright*, 497 U.S. 805, 814 (1990). Such a blanket exclusion of otherwise admissible evidence in the name of the Confrontation Clause would be a result "unintended and too extreme." *Wright*, 497 U.S. at 814, quoting *Bourjaily v. United States*, 483 U.S. 171, 182 (1987), quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

Reliability[3] is the question and two tests have emerged. "Reliability can be inferred without more in a case where the evidence falls within a *firmly rooted hearsay exception*. In other cases, the evidence must be excluded,

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the States; and Massachusetts, *Commonwealth v. Carr*, 373 Mass. 617, 369 N.E.2d 970, 974 (1977); New York, *People v. Brown*, 26 N.Y.2d 88, 91, 308 N.Y.S. 825, 826-27, 257 N.E.2d 16, 17-19 (1970); Pennsylvania, Pennsylvania Rules of Evidence, Rule 804(b)(3); *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344, 346 (1974); and the District of Columbia, *Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979).

[3] In this context, we suggest that the meaning attached to the term "reliability" and the concept of factual accuracy should be indistinguishable. In daily life, rational individuals routinely judge the "reliability" of another person's statement by virtue of the listener's ability to independently verify the factual "accuracy" of that statement. The law should be no less rational in its approach to this legitimate concern.

at least absent a showing of *particularized guarantees of trustworthiness*." *Wright*, 497 U.S. at 815 (emphasis added). The two tests are not inter-dependent. Meeting either of the two tests suffices to allow the introduction of the offered evidence.

II.

THE ADMISSION AGAINST INTEREST EXCEPTION IS A FIRMLY ROOTED EXCEPTION.

This Court has held that the concerns of the Confrontation Clause and the concerns of the historically developed and pragmatic rules regarding the admissibility of hearsay testimony are related and therefore no independent inquiry into the reliability of an offered out-of-court statement is required under the Confrontation Clause when its admission into evidence satisfies the requirements of a "firmly rooted" exception to the rule against hearsay testimony. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), citing *California v. Green*, 399 U.S. 149, 155 (1970) and *Dutton v. Evans*, 400 U.S. 74, 86 (1970).

A.

An exception "firmly rooted" in a historical landscape

This Court has stated that the inquiry into whether a particular exception to the rule against hearsay is "firmly rooted" has "included historical examination of the origins of the Confrontation Clause and of the state of the law of evidence existing at the time the Sixth Amendment was adopted and later." *White*, 502 U.S. at 352.

The admissibility of admissions against the interests of a declarant as an exception to the rule against hearsay has a long history in the evidentiary law of England and this country. "[T]he exception to the hearsay rule in the case of declarations against interest is well known"; *Donnelly v. United States*, 228 U.S. 243, 277 (1913) (Justice Holmes, dissenting).

With particular reference to statements against penal interest, it has been noted that such a rule of evidence was recognized by the English courts back perhaps as far as the early 1700's.[4] This rule prevailed until the mid-1800's when "in a case in the House of Lords, not strongly argued and not considered by the judges in the light of precedents, a backward step was taken and an arbitrary limit put upon the rule."[5] It was this questionable ruling which *removed* from English law the hearsay exception for statements against penal interest. Thus it would appear that at the time the Confrontation Clause was placed within our federal constitution, a hearsay exception covering statements against penal interest had long been recognized by the common law of England.

That same exception has now firmly re-entrenched itself in the state and federal laws of this nation.[6] The

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[4] *Wigmore on Evidence*, § 1455, p. 349.

[5] *Wigmore*, § 1476, p. 350.

[6] See footnote 2. See also, *State v. Matuskey*, 343 Md. 467, 682 A.2d 694 (1996); *Simmons v. State*, 333 Md. 547, 636 A.2d 463 (1994); *Riddle v. State*, 314 S.C. 1, 443 S.E.2d 557 (1994); *State v. Doctor*, 306 S.C. 527, 413 S.E.2d 36 (1992); *State v. Hallum*, 585 N.W.2d 249 (Iowa 1998); *Commonwealth v. Young*, 1999 WL 24540 (Pa. 1999).

drafters of the *Federal Rules of Evidence*, guided by hundreds of years experience, opted to re-expand the exception "to the full logical limit." *Federal Rules of Evidence*, Rule 804(b)(3), Advisory Committee Notes, 1972 Proposed Rules; see also *Wigmore*, § 1477, p. 358-360.[7]

For over 20 years the federal rules, and the many states which have followed that model, have recognized the compelling logic of the exception here in question. A legal concept which dates to the 1700's, was arbitrarily removed from English law, and yet over time has re-established itself in the laws of a clear majority of the jurisdictions in this country as a compellingly rational pronouncement, surely *was and is* "firmly rooted" for purposes of the Confrontation Clause analysis described in *Wright*.[8]

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[7] The English rule eliminating statements against penal interest as an exception to the rule against hearsay "is inconsistent with the broad language originally employed in stating the reason and principle of the present exception as well as with the settled principle upon which confessions are received. . . . [F]urthermore, it cannot be justified on grounds of policy."

[8] The following jurisdictions have found statements against penal interest to be "firmly rooted": *United States v. Barone*, 114 F.3d 1284, 1302 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 614, 139 L.Ed.2d 500 (1997); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2nd Cir. 1983); *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991); *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988); *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *State v. Torres*, 1998 WL 896350 (N.M. 1998); *State v. Gilliam*, 635 N.E.2d 1242 (Ohio 1994); *Lilly v. Commonwealth*, 499 S.E.2d 522 (Va. 1998).

The logic of this Court's cases is that there do exist certain types of statements which, based upon the corporate experience of human beings, are simply so unlikely to be fabricated that they need not be subjected to the theater of cross examination to be deemed at least worthy of *consideration* by a fact finder. That is the primary function served by the historical development of exceptions to the rule against hearsay.

> [S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes.

Lee v. Illinois, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) cited with approval in *Wright*, 497 U.S. at 817.

To say that the hearsay exception covering statements against penal interest is not "firmly rooted" or "squarely established" within the law of this country denies the historical and evolutionary processes by which our state and federal rules of evidence are developed.[9]

[9] We note that the statement here in question was not offered under a "residual" hearsay exception, which some states have crafted, and which this court addressed in *Wright*. Instead, this statement was offered under a hearsay exception specifically and routinely recognized under state and federal law.

B.

A question of state law

Placing aside for the moment the historical component of the "firmly rooted" analysis, which looks to the state of the law at the time th Confrontation Clause became a part of our federal constitution, the "evolutionary component" of the analysis,[10] in state cases, necessarily presents a question of state law. In the vast majority of criminal prosecutions nationally, these rules evolve in our state courts and state legislatures. Thus the process of developing evidentiary rules for the state courts is exclusively a matter of state law.

Therefore, an important question inherent in the concept of a "firmly rooted" exception must be: *Where* must this exception be firmly rooted? Prior cases have not answered that question.

If the Confrontation Clause does not dictate rules of evidence for the states, then we suggest that the question of whether a state rule of evidence is "firmly rooted" becomes, for the second component of the analysis, necessarily a question of whether that exception is "firmly

[10] The inquiry into whether a particular exception to the rule against hearsay is "firmly rooted" has "included historical examination of the origins of the Confrontation Clause and of the state of the law of evidence existing at the time the Sixth Amendment was adopted *and later*." *White*, 502 U.S. at 352 (emphasis added).

rooted" in state law. That is a question which a state's highest court is empowered to dispositively determine.

The Virginia Supreme Court specifically found, *as a matter of state law*, that the hearsay exception under which the statement in question was admitted was "firmly rooted" in the evidentiary law of the State of Virginia. *Lilly v. Commonwealth*, 255 Va. 558, 573, 499 S.E.2d 522, 533 (1998).

None of this Court's cases addressing this question indicate in what particular plot of soil the hearsay exception in question need be "firmly rooted". For state courts, the development of hearsay exceptions is *necessarily a function of state law.* Therefore, we believe the finding by the Virginia Supreme Court that the hearsay exception here at issue is "firmly rooted" in Virginia law is unavoidably relevant to the analysis described in *Wright*.

If the state evidentiary rule under which an out-of-court statement is admitted is found to be "firmly rooted" in the law of that state by that state's highest court, we suggest that finding should be dispositive of the evolutionary component of the "firmly rooted" question framed by this Court's prior decisions on this subject.

The opinions of this Court have not instructed how these two components of the "firmly rooted" question are to be weighed. We suggest the state-law-based component should be given considerable weight in this analysis.

III.

A BROAD EXCLUSION OF CUSTODIAL STATEMENTS AGAINST INTEREST IS NEITHER LOGICAL NOR NECESSARY TO ACHIEVE THE ENDS ULTIMATELY DESIRED BY BOTH THE CONFRONTATION CLAUSE AND OUR RULES OF EVIDENCE: THE TRUTH

A.

At worst, a rebuttable presumption

If we need reach the second of the two tests described in *Wright*, the opportunity for the party offering the custodial statement against penal interest to establish particularized guarantees of trustworthiness should be preserved.

In that context, even Justice Brennan acknowledged that whatever presumption may exist against the use of such statements: "[T]he presumption may be rebutted . . . ". *Lee v. Illinois*, 476 U.S. 530 (1986). That statement of the rule *admits* the very real possibility, if not the likelihood, that circumstances making the introduction of such evidence appropriate will be found to exist. See *Bourjaily v. United States*, 483 U.S. 171, 179 (1987).

It is the ***opportunity*** to demonstrate that particularized guarantees of trustworthiness exist in a specific case that the amici states urge this court to preserve.

Will all such statements offered by the government be admitted into evidence? No. However, the range of

factual possibilities is immense.[11] If the government meets its burden of establishing particularized guarantees of trustworthiness, the exclusion of such a statement under a broad, generic prohibition would not further the Confrontation Clause's search for truth. Instead, it will thwart it.

B.

The scope of corroboration

Finally, we ask this court to revisit its decision in *Wright* to expand, to the extent that *Wright* may be read to limit, the scope of corroboration allowed to demonstrate the "particularized guarantees of trustworthiness" which may be required by the Confrontation Clause.

Lilly argues that *Wright* limits the offer of evidence on this question to those circumstances that surround the making of the statement. That construction appears to be driven, not by the independent concerns of the Confrontation Clause, but upon the distinct rationales historically employed as a basis for creation of hearsay exceptions themselves. *Wright*, 497 U.S. at 819. We suggest that to the extent *Wright* can be read to impose corroboration limits

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[11] For example, the Nebraska Supreme Court now has pending before it a case in which (1) the declarant's incriminating statement was not legally exculpatory, (2) the statement was made after being afforded full benefit of counsel, and (3) the statement provides numerous details accurately describing the murder not known to the public. *State v. Sheets*, #S-97-1069.

upon the *state courts* when resolving questions of admissibility under *state evidentiary rules*, rather than instructing upon the separate requirements of the Confrontation Clause, that is not an appropriate focus for this Court.

We believe the analysis requires two distinct steps. First, does the offered statement meet the requirements of state evidentiary rules? If not, the statement is inadmissible and the Confrontation Clause concern is never reached. Only if the statement is admissible under state evidentiary standards do the federal constitutional concerns of the Confrontation Clause need to be addressed.[12]

In that second step, if one is challenged to rebut a presumption of unreliability with evidence demonstrating particularized guarantees of trustworthiness, it would seem only logical and appropriate to allow the person bearing that burden to offer *any credible evidence* that the statement offered is, in fact, accurate and thus reliable.[13] To meet that burden the state should be allowed to offer physical and testimonial evidence which tends to increase the likelihood that the declarant did, in fact, utter the truth.

The thought that the Sixth Amendment's requirement of cross examination was only contemplated in, and can only arise in, the context of an "available" witness has logical merit. The law permits numerous other forms of non-testimonial evidence admission before a fact finder without requiring the opportunity for cross examination.

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[12] A similar approach was employed in *State v. Hallum*, 585 N.W.2d 249, 256-259 (Iowa 1998).

[13] See footnote 3.

For instance, one cannot cross examine an item of physical evidence, yet we allow it to be placed before the fact finder subject, of course, to whatever attack the opponent can muster through other witnesses and other evidence to either corroborate or discredit its meaning.

If the concern of the Confrontation Clause is to further the ascertainment of truth, rather than the re-writing of state evidentiary law, then it would seem that the scope of evidence appropriately corroborating an offered statement against interest could and should be expanded to include *any reasonable indicia* that the statement is accurate. That is clearly the approach taken by the Virginia Supreme Court in this instance, and one which seems best suited to meeting the truth finding concerns of the Confrontation Clause.[14]

CONCLUSION

First, we believe the hearsay exception for statements against penal interest is a "firmly rooted" exception as required by *Wright*.

Second, should particularized guarantees of trustworthiness be deemed necessary to satisfy the Confrontation Clause, we urge this Court to expand, rather than

[14] "Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, *the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given.*" *Lilly*, 499 S.E.2d at 534 (emphasis added).

further limit the opportunities for the states to meet that burden.

For those reasons we urge that the judgment of the Supreme Court of Virginia be affirmed.

Respectfully submitted,

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